No. 91-1833-CFX
Status: GRANTED

Docketed:
May 14, 1992

Title: Michael E. Lincoln, Acting Director, Indian Health Service, et al. Petitioners
v.
Grover Vigil, et al.

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Jasperse,Joel

Time to file ext by J. White to & inc May 24, 1992.
CITED

Entry	Date	Note	Proceedings and Orders
1	Apr 2 1992	G	Application (A91-733) to extend the time to file a petition for a writ of certiorari from April 14, 1992 to May 14, 1992, submitted to Justice White.
3	Apr 2 1992		Application for extension of time to file petition and order granting same until May 14, 1992 (White, April 3, 1992).
2	Apr 3 1992		Application (A91-733) granted by Justice White extending the time to file until May 14, 1992.
4	May 14 1992	G	Petition for writ of certiorari filed.
6	Jun 11 1992		Order extending time to file response to petition until July 17, 1992.
7	Jul 17 1992		Brief of respondents Grover Vigil, et al. in opposition filed.
8	Jul 22 1992		DISTRIBUTED. September 28, 1992
9	Aug 18 1992	X	Reply brief of petitioners Everett Rhoades, Indian Health Service, et al. filed.
10	Oct 5 1992		Petition GRANTED.
			**********
13	Oct 30 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Tenth Circuit.
11	Nov 19 1992		Joint appendix filed.
12	Nov 19 1992		Brief of petitioner Everett Rhoades, Indian Health Service, et al. filed.
14	Dec 28 1992		SET FOR ARGUMENT WEDNESDAY, MARCH 3, 1993. (2ND CASE).
15	Dec 28 1992		Brief amici curiae of National Congress of American Indians, et al. filed.
16	Dec 28 1992		Brief amici curiae of Native American Protection & Advocacy Project, et al. filed.
17	Dec 28 1992		Brief of respondents Grover Vigil, et al. filed.
18	Dec 28 1992		Brief amici curiae of Bristol Bay Area Health Corporation, et al. filed.
19	Jan 5 1993		CIRCULATED.
20	Jan 29 1993	X	Reply brief of petitioners filed.
22	Feb 5 1993		Record filed.
		*	Original proceedings U. S. District Court, District of New Mexico (Box)
21	Feb 25 1993		Errata sheet from counsel for respondents received and

No. 91-1833-CFX

Entry	Date	Note	Proceedings and Orders
			distributed.
23	Mar 3 1993		ARGUED.

In the Supreme Court of the United States

OCTOBER TERM, 1991

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, ET AL., PETITIONERS

v.

GROVER VIGIL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that statements made in congressional committee reports and hearings on lump-sum appropriations bills, together with general notions of the federal "trust" responsibility for Indians, constitute "law to apply" for purposes of judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 (a)(2), of agency action affecting Indians.

2. Whether the court of appeals erred in holding that an agency's decision to reallocate funds and personnel from a discretionary pilot project providing certain health-related services for Indians in order to provide other health-related services constitutes rulemaking subject to the notice and comment requirements of the APA, 5 U.S.C. 553.

PARTIES TO THE PROCEEDINGS

Petitioners are Everett R. Rhoades, M.D., Director of the Indian Health Service; Louis W. Sullivan, Secretary of Health and Human Services (substituted as a party pursuant to Rule 35.3 of this Court); the Department of Health and Human Services; Manuel Lujan, Jr., Secretary of the Interior (also substituted pursuant to Rule 35.3); Eddie F. Brown, Assistant Secretary of the Interior—Indian Affairs (also substituted pursuant to Rule 35.3); the Department of the Interior; and the United States.

Respondents are Grover Vigil and Charlene Vigil as general guardians and next friends for Ashley Vigil, a minor; Kee Sandoval and Judy Sandoval as general guardians and next friends for Kristofferson Sandoval, a minor; Angela C. Allen, as general guardian and next friend for Angelo Allen, a minor; and all other persons similarly situated.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, ET AL., PETITIONERS

v.

GROVER VIGIL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of Everett R. Rhoades, M.D., Director of the Indian Health Service, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 953 F.2d 1225. The opinions of the district court (App., *infra*, 17a-45a, 46a-56a) are reported at 746 F. Supp. 1471.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1992. On April 3, 1992, Justice White extended the time for filing a petition for a writ of certiorari to and including May 14, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Snyder Act, 25 U.S.C. 13; the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1601 *et seq.* (1982); the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*; and the appropriations acts for the Indian Health Service for fiscal years 1980 and 1985, Act of Nov. 27, 1979, Pub. L. No. 96-126, Tit. II, 93 Stat. 954, 973-974, and Act of Oct. 12, 1984, Pub. L. No. 98-473, Tit. II, 98 Stat 1837, 1863-1865, are reproduced at App., *infra*, 57a-73a.

STATEMENT

1. The Indian Health Service (IHS), an agency within the Department of Health and Human Services, receives annual lump-sum appropriations from Congress to fund health services programs for Indians. Those appropriations are allocated and expended by IHS under the authority of the Snyder Act, 25 U.S.C. 13, and the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1601 *et seq.* The Snyder Act provides in part that the agencies responsible for Indian affairs "shall direct, supervise, and expend such moneys as Congress may * * * appropriate, for the benefit, care, and assistance of the Indians * * * for the * * * relief of distress and conservation of health." 25 U.S.C. 13.[1] Title II of the IHCIA author-

[1] The Snyder Act initially applied only to expenditures by the Bureau of Indian Affairs (BIA), an agency within the Department of the Interior. The Indian Hospitals and Health Facilities Act (Transfer Act), 42 U.S.C. 2001, transferred responsibility for Indian health from the BIA to the Department of Health and Human Services.

izes supplemental appropriations in a number of broad health-related areas, including patient care, field health, and mental health. 25 U.S.C. 1621.

The IHS has adopted general regulations implementing its authority to provide health services to Indians. Those regulations state that "[t]he services provided to any particular Indian community will depend upon the facilities and services available from sources other than the [IHS] and the financial and personnel resources made available to the [IHS]." 42 C.F.R. 36.11(c); see also 42 C.F.R. 36.12(a) (services will be provided to qualified persons of Indian or Alaska Native descent "to the extent that funds and resources allocated to the particular Health Service Delivery Area permit").

In 1978, the IHS allocated approximately $292,000 from its fiscal year 1978 appropriations to the IHS headquarters' mental health branch in Albuquerque, New Mexico, for development of a pilot program for handicapped children. App., *infra*, 4a-5a. That program, which became known as the Indian Children's Project (ICP), developed into a joint endeavor by the IHS and the BIA. Between 11 and 16 staff members were assigned to the ICP to provide monitoring and assessment services for handicapped Indian children primarily in the southwestern United States.[2]

[2] The ICP staff was based in Albuquerque. Staff members visited reservation communities about once a month. The services provided included identification and diagnosis of mentally handicapped children, development and monitoring of their treatment plans, "consultative visits" in children's home communities, and training. App., *infra*, 12a, 19a. The ICP personnel generally did not, however, perform as the primary furnishers of rehabilitative and other services to the children. Rather, because ICP staff visited communities no more than once a month, children monitored by the ICP staff

The ICP originated in part in an effort to assess the need for a separate treatment center for handicapped Indian children. App., *infra*, 5a; *Department of the Interior and Related Agencies Appropriations for 1980: Hearings Before the Subcomm. on the Dep't of the Interior of the House Comm. on Appropriations*, 96th Cong., 1st Sess. Pt. 8, at 245-252 (1979). Although the IHS included $3.5 million for such a center in its total budget request for fiscal year 1980, Congress did not specifically include funds for that purpose in IHS's appropriation Act for that year. The relevant committee reports did state, however, that the House Committee had provided an increase of $300,000 in total funding for Indian health services in order to permit expansion of the handicapped children's program into a nationwide effort. See H.R. Rep. No. 374, 96th Cong., 1st Sess. 82-83 (1979); S. Rep. No. 363, 96th Cong., 1st Sess. 91 (1979). The ICP thereafter remained a regional pilot project based in the southwest and serving reservation communities in New Mexico, Southern Colorado, and the Navajo and Hopi Reservations. IHS continued to fund the ICP from its annual lump-sum appropriations throughout the period from 1980 to 1985.

By 1985, IHS management had decided that the staff efforts then being devoted to the ICP could be more effectively utilized within the IHS system if they were devoted instead to providing technical assistance and consulting services to all IHS areas and service units on a nationwide basis. App., *infra*, 2a, 20a. Accordingly, IHS decided to terminate the more

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had to seek primary therapy from among whatever services were available to them at local IHS facilities, at their schools, or from other sources, such as Medicaid and state programs. Deposition of Ann Galoway-Leigh at 104-105, 130-131.

narrowly focused ICP and to reallocate its resources to the nationwide effort. The decision to discontinue direct patient consultative services through the ICP was announced in a memorandum dated August 21, 1985, from the acting ICP clinical and administrative directors to IHS Area Offices, IHS service units, and all referral sources. Gov't C.A. Add. Exh. 8.[3]

2. Subsequently, respondents brought this action in the United States District Court for the District of New Mexico seeking declaratory and injunctive relief. The complaint alleged that the termination of the services offered to handicapped children through the ICP violated, inter alia, the "federal trust responsibility to Indians, the Administrative Procedure Act (APA), * * * the Snyder Act, * * * [and] the Indian Health Care Improvement Act." App., *infra*, 2a-3a.

On July 6, 1990, the district court granted summary judgment for respondents. App., *infra*, 17a-45a. The court held that the IHS's decision to terminate the ICP, and to reallocate its resources to a nationwide effort to ensure the availability of services to all handicapped Indian children, was not "committed to agency discretion by law" within the meaning of 5 U.S.C. 701(a)(2). The court believed that the statutes involved, although broadly worded—together with Congress's awareness of the ICP when it authorized lump-sum appropriations for the IHS—provided "ample" law to permit a court to assess the IHS's

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[3] As of August 1985, the staff was following 426 children. App., *infra*, 20a. The staff conducted concluding consultations with parents, professionals, and others concerned with each of those children. Deposition of Mary Ellen Sanchez 44-46. The BIA continues to follow handicapped children in the ICP service area (and elsewhere) pursuant to its educational responsibilities. App., *infra*, 6a.

action. App., *infra*, 30a. Thus, the court held that the action was judicially reviewable.

The court further held that the decision to terminate the ICP constituted administrative rulemaking, reasoning that the Administrative Procedure Act (APA) "broadly defines an agency rule to include nearly every statement an agency may make." App., *infra*, 38a (quoting *Batterton* v. *Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980)). The court rejected the argument that the termination decision was exempt from the notice-and-comment requirement because it involved merely an "interpretive" rule or "general statement of policy." See 5 U.S.C. 553(b)(A). The court held that because the termination had significant effects on private interests, it was a "legislative rule" subject to the notice-and-comment provisions of the APA, 5 U.S.C. 553, and that the IHS's decision to terminate the ICP was therefore procedurally invalid because the agency had not published its decision for public comment. App., *infra*, 38a-44a.[4]

3. The court of appeals affirmed. App., *infra*, 1a-16a. The court acknowledged that manageable standards for reviewing IHS's decision to terminate the ICP were "difficult to find" in the Snyder Act and the IHCIA, observing that the ICP "appears to have been created at the discretion of the IHS" and that respondents had "not cited any statute or regulation which even refers to the Project or provides specific standards for reviewing its termination." App., *infra*, 10a-11a. But the court nonetheless held that there was sufficient "law to apply" to permit judicial review. Pointing to congressional hearing testimony and committee reports accompanying IHS's lump-sum appropriations, the court first concluded that Congress "was informed of" and "intended to fund" the ICP, "albeit through general appropriations." App., *infra*, 13a. In addition, the court believed that the "special relationship" between the Indian people and the United States " 'suggests that the withdrawal of benefits from Indians merits special consideration.' " App., *infra*, 13a, 14a (quoting *Vigil* v. *Andrus*, 667 F.2d 931, 936 (10th Cir. 1982)). In the court's view, this "special consideration," coupled with "Congress' recurring budgeting recognition of the Project," provided "an appropriate backdrop for judicial review" to determine whether IHS's action "ultimately does redound to the 'benefit, care and assistance' of Indians." App., *infra*, 14a-15a (quoting *id.* at 31a, and the Snyder Act, 25 U.S.C. 13).

The court of appeals also held that IHS was required to follow notice-and-comment rulemaking procedures before terminating funding for the ICP. The court believed that this holding was required by *Morton* v. *Ruiz*, 415 U.S. 199 (1974), which it understood to stand for the broad proposition that "notice and comment procedures should be provided any time the government 'cuts back congressionally created and funded programs for Indians' even when the Indians have no entitlement to the benefits." App., *infra*, 15a (citing *Vigil* v. *Andrus*, 667 F.2d at 936).

REASONS FOR GRANTING THE PETITION

The court of appeals' reasoning fundamentally distorts both appropriations law and administrative law, and is inconsistent with decisions of this Court and of the lower courts. If allowed to stand, the decision

[4] After further briefing, the district court issued an additional memorandum opinion and order directing IHS to reinstate the program. App., *infra*, 46a-56a. A restored ICP is currently in place.

below will impose substantial and unjustifiable burdens on the ability of the Indian Health Service and the Bureau of Indian Affairs to exercise the discretion and flexibility vested in them by Congress to address the needs of Indians and to allocate scarce resources among various programs in light of changing circumstances.

The court's holding that precatory statements made in congressional committee reports and hearings can supply "law to apply" sufficient to permit judicial review of an agency's allocation of lump-sum appropriations conflicts with *International Union, UAW* v. *Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 474 U.S. 825 (1985), and with the fundamental principle that Congress makes law only through formal action of the full House and Senate and presentment to the President, not by conducting hearings or drafting committee reports. The result is to elevate legislative history to the status of an Act of Congress, and in so doing to rob the IHS and other agencies of the latitude and discretion necessary to administer Indian programs. Under the decision below, even the most mundane agency funding and resource allocation decisions will apparently be subject to judicial review if the relevant program or project is so much as mentioned—as many are—in a committee report or congressional testimony.

In addition, the decision below transforms the federal "trust" responsibility for Indian property into a substantive legal constraint on the discretion of federal agencies generally, wholly divorced from any statutory or regulatory requirements or from any showing of an impact on vested property rights. By holding that this "trust" notion creates substantive "law to apply" for purposes of judicial review of agency decisionmaking, and by imposing a novel and

far-reaching notice-and-comment requirement on all federal agency action affecting services to Indians, the court of appeals has expanded the federal "trust" responsibility far beyond its legitimate bounds, in a manner contrary to the decisions of this Court.

For the foregoing reasons, review by this Court is warranted.

1. a. Agency actions are exempt from judicial review where "agency action is committed to agency discretion by law," 5 U.S.C. 701(a)(2), as in "those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971). See also *Webster* v. *Doe*, 486 U.S. 592, 600 (1988); *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985) ("[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."). The court of appeals found "law to apply" in this case by looking in part to "[c]ongressional hearings testimony and reports" indicating awareness and approval by congressional committees of the IHS's continued funding of the ICP. App., *infra*, 11a. The lump-sum appropriation provisions in the bills to which those materials pertained contained no mention of the ICP. See, *e.g.*, App., *infra*, 67a-73a. Thus, the effect of the court's holding is to elevate congressional hearings and committee reports to the level of binding law, in direct disregard of this Court's admonition that those materials do not have the "force of law." *American Hospital Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1545 (1991). See also *United States* v. *R.L.C.*, 112 S. Ct. 1329, 1342 (1992) (Thomas, J, concurring in part and in the judgment) ("committee reports and floor state-

ments * * * are not law"). "[T]he Constitution is quite explicit about the procedure that Congress must follow in legislating," *American Hospital Ass'n*, 111 S. Ct. at 1545, and committee hearings and reports are not the operative end-product of that procedure. Cf. *INS* v. *Chadha*, 462 U.S. 919 (1983). Accordingly, the court of appeals erred in attributing binding and continuing legal force to those materials, which concerned annual appropriations laws that have long since expired.

In *International Union, UAW* v. *Donovan*, 746 F.2d 855 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 474 U.S. 825 (1985), the District of Columbia Circuit expressly rejected the suggestion that legislative history could provide "law to apply" so as to permit judicial review of an agency's allocation of a lump-sum appropriation among various programs:

> [L]egislative history is relevant to our inquiry—but not directly relevant. As the Supreme Court has said (in a case involving precisely the issue of Executive compliance with appropriation laws, although the principle is one of general applicability): "legislative intention, without more, is not legislation." *Train v. City of New York*, 420 U.S. 35, 45 * * * (1975). The issue here is not how Congress expected or intended the Secretary to behave, but how it *required* him to behave, through the only means by which it can (as far as the courts are concerned, at least) require anything—the enactment of legislation. Our focus, in other words, must be on the text of the appropriation.

746 F.2d at 860-861. The decision below, to the extent it authorizes reliance on legislative history as a source of law to apply in reviewing agency action concerning the expenditure of funds under a lump-sum

appropriation, conflicts with *International Union*. Accordingly, review by this Court is warranted.

b. The court of appeals did not rest its reviewability holding exclusively on legislative history. The court also relied on (i) its view of a "special relationship" between the federal government and the Indian people (which it alternatively termed a "guardian-ward," "trust," or "fiduciary" relationship), and (ii) the fact that the Snyder Act authorizes the expenditure of funds for "the relief and conservation of health" of Indians. App., *infra*, 13a-15a. Neither, however, provides "law to apply."

"It is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987). That federal responsibility, however, "do[es] not create property rights where none would otherwise exist but rather presuppose[s] that the United States has interfered with existing tribal property interests." *Ibid.* In this case, there are no existing Indian property rights at stake that could invoke a federal "trust" responsibility.[5] Funds allocated under the Snyder Act are gratuitous appropriations, not trust funds belonging to the Indians. *Scholder* v. *United*

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[5] Indeed, even where Indian property rights *are* implicated, the term "trust" is something of a misnomer. "[T]he fiduciary relationship springs from the statutes and regulations which 'define the contours of the United States' fiduciary responsibilities.'" *Pawnee* v. *United States*, 830 F.2d 187, 192 (Fed. Cir. 1987) (quoting *United States* v. *Mitchell*, 463 U.S. 206, 224 (1983)). Thus, where the federal government has fully complied with all applicable statutes, treaties, regulations, and contractual provisions in dealing with Indian property interests, no claim for breach of "trust" can be stated. *Pawnee*, 830 F.2d at 192.

States, 428 F.2d 1123, 1129 (9th Cir.), cert. denied, 400 U.S. 942 (1970); compare *United States* v. *Dann*, 470 U.S. 39, 49-50 (1985). In distributing such funds, "[t]he United States acts in no more a fiduciary capacity * * * than it does in distributing *any* funds appropriated by Congress." *James* v. *Department of Health & Human Servs.*, 12 Indian L. Rep. (Am. Indian Law Training Program) 3097, 3100 (D.D.C. Aug. 14, 1985).

The court of appeals ignored these limitations on the judicially cognizable "trust" responsibility of the federal government, and instead invoked generalized notions of a "special relationship." It held that the United States owes a general duty of "fairness" to Indian peoples that imposes substantive constraints on the discretion of the Executive Branch even in the absence of any Indian property interests or other vested rights—and even in the absence of any statute in which Congress has chosen to embody such a duty and to codify standards that might be enforced by a court.[6] This extra-statutory and unanchored principle of judicial review has an almost limitless potential for justifying judicial second-guessing of Executive Branch decisionmaking affecting Indians, and is unsupported by this Court's cases. It should not be permitted to stand.

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[6] The court did not explain how such a duty could be articulated so as to provide judicially manageable standards for decision. In this case, for example, the IHS terminated the ICP so as to utilize the available funds and resources in a manner that would benefit Indian children nationwide rather than solely in the southwest. What is "fair" in such a circumstance is a judgment that courts are ill suited to make. Cf. *Hoopa Valley Tribe* v. *Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986) (holding that there is no federal trust responsibility that can be discharged to the benefit of some Indians but at the expense of others).

The Snyder Act's vague and general language likewise furnishes no "law" for a court to apply in a case such as this. That Act simply *authorizes* the IHS and the BIA to expend whatever funds Congress may appropriate for the "benefit, care and assistance" of Indians in a number of broad subject areas, including "the relief and conservation of health" of Indians. It does not *require* funds to be spent for any particular purpose or prescribe criteria to be followed by the IHS or BIA in allocating resources among their various programs for the "benefit, care and assistance" of Indians. Compare *United States* v. *Alaska*, No. 118 Orig. (Apr. 21, 1992), slip op. 6. The Snyder Act therefore provides no judicially manageable standards for judging whether the IHS's decision to transfer staff from a regional to a nationwide program is proper. Cf. *Scholder* v. *United States*, 428 F.2d at 1128 (rejecting contention that Snyder Act "present[s] federal courts with the unenviable task of reviewing individual [BIA] expenditures and speculating in each instance about [who are the] potential beneficiaries"). Even the court of appeals apparently did not view the Snyder Act as sufficient in itself to furnish "law to apply," since it acknowledged that "specific manageable standards for reviewing the funding termination are difficult to find in the Snyder Act." App., *infra*, 10a. Instead, the court looked to the Act only to inform the "overriding duty of fairness" that it believed was required by the "special relationship" between the United States and Indians. App., *infra*, 13a, 14a, 15a n.7. As already explained, the court plainly erred in fashioning that judicially enforceable duty, which has no basis in any Treaty or Act of Congress.[7]

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[7] Put another way, Congress has chosen to fulfill *its* view of the special relationship between the United States and

c. That there should be no law to apply to the agency decision at issue in this case is hardly surprising. Courts, including the Tenth Circuit, have observed that agency funding decisions are "notoriously unsuitable for judicial review, for they involve the inherently subjective weighing of the large number of varied priorities which combine to dictate the widest dissemination of an agency's limited budget." *Community Action of Laramie County, Inc.* v. *Bowen*, 866 F.2d 347, 354 (10th Cir. 1989) (citing *Alan Guttmacher Inst.* v. *McPherson*, 597 F. Supp. 1530, 1536-1537 (S.D.N.Y. 1984)); compare *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985) (agency decisions not to enforce law committed to agency discretion because they involve "complicated balancing of a number of factors which are peculiarly within its expertise," including the allocation of scarce "agency resources" and "the proper ordering of its priorities"). That is particularly true where, as here, the agency's decision involves allocation of lump-sum appropriations, because such appropriations have long been understood to "leave[] it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit." *International Union, UAW* v. *Donovan*, 746 F.2d at 861; compare *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987) (agency action unreviewable where matter has traditionally been regarded as committed to agency discretion); *Chaney*, 470 U.S. at 832 (same). Finally, to permit judicial review in cases such as this would impermissibly involve the courts in agency administration, which would have "disruptive practical consequences." *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 (1979).

Indians in this setting by enacting the Snyder Act (and annual appropriations authorized by that Act) and vesting broad discretion and flexibility in the IHS and the BIA. Because Congress has implemented and given content to the special relationship in this manner, that relationship furnishes no independent basis for a court to review and constrict the discretion of the agencies in which Congress chose to vest responsibility.

For the foregoing reasons, among others, the courts have long declined to review agency decisions involving the termination or reallocation of agency services or resources. See *National Federation of Federal Employees* v. *United States*, 905 F.2d 400, 405-406 (D.C. Cir. 1990) (decision to close military bases is committed to agency discretion by law);[8] *Sergeant* v. *Fudge*, 238 F.2d 916, 917 (6th Cir. 1956) (no review of a decision to discontinue a post office), cert. denied, 353 U.S. 937 (1957); *Los Angeles Customs & Freight Brokers Ass'n* v. *Johnson*, 277 F. Supp. 525, 532-534 (C.D. Cal. 1967) (no review of a decision to shift the location of a customs office). The IHS action respondents challenge here is, in principle, no different from the administrative decisions challenged in those cases. In the absence of meaningful standards by which to review the IHS's allocation of funds and resources, that action is "committed to agency discretion by law," 5 U.S.C. 701(a)(2), and therefore is not subject to judicial review.

2. a. The district court further held that the decision to terminate the ICP constituted legislative rulemaking subject to the notice-and-comment requirements of the APA. App., *infra*, 35a-44a. While the court of appeals did not engage in a detailed discus-

[8] Cf. *Specter* v. *Garrett*, No. 91-1932 (3d Cir. Apr. 17, 1992), slip op. 23-24 (substance of President's decision to close military base not subject to judicial review).

sion of that ruling, it expressly "f[ou]nd no error in [the district court's] analysis of the rule making issue." App., *infra*, 16a. In our view, the court of appeals was fundamentally mistaken on that point.

The APA requires agencies to follow notice-and-comment procedures when promulgating legislative rules. 5 U.S.C. 553. The term "rule" is defined to mean:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing."

5 U.S.C. 551(4). The attribute of prospectivity is of central importance in determining whether agency action constitutes rulemaking: "[A] rule is a statement that has legal consequences only for the future," and "deals with what the law will be." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 217, 221 (1988) (Scalia, J., concurring). Thus, a rule "must be of *future effect*, implementing or prescribing *future law*," and "is agency action which regulates the *future conduct* of either groups of persons or a single person." *Id.* at 218-219 (quoting *Attorney General's Manual on the Administrative Procedure Act* at 13-14 (1947)) (emphasis added).[9]

[9] The Court has previously accorded deference to the Attorney General's Manual "because of the role played by the Department of Justice in drafting the legislation." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978).

The IHS decision to reallocate resources from the ICP to a nationwide effort on behalf of handicapped Indian children was clearly not a "rule" under this definition. The decision did not prescribe law for the future, or purport to impose binding requirements or standards governing future action by either the IHS or private parties. To be sure, the IHS's action had a "future effect" in the sense that it had consequences that would be felt in the future (when particular services would not be available out of the Albuquerque office); but that cannot suffice to render the IHS's decision a "rule," because the same can be said of *any* agency decision not to follow a certain course of conduct in the future.[10] The crucial distinction is that although the agency's resource allocation decision in such cases may have ramifications for the future, it is not accompanied by an "agency *statement*" that is independently of "future effect" in the sense that it *prescribes law or policy* for the future; the agency's reallocation decision is self-contained, and does not purport to bind or guide other decisions that may be made by the agency (or private parties) down the road. In this case, for example, nothing about the IHS's August 1985 decision to terminate the ICP and reallocate the resources elsewhere would have prevented IHS from changing its mind and reinstating the program in whole or in part at some later date, and the IHS would not have been required to modify or rescind the August 1985 decision to do so. Thus,

[10] Indeed, an agency adjudication can have consequences for the future (*e.g.*, if it results in a cease-and-desist order), but those consequences obviously do not render the adjudicatory decision a rule.

the courts below clearly erred in holding that the termination decision constituted a "rule."

This conclusion is underscored by *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). *Overton Park* involved a challenge to an agency decision to expend federal funds to build a highway through a park. The Court held that the agency decision to allow the expenditure of federal funds "was plainly not an exercise of a rulemaking function." 401 U.S. at 414. It follows that neither the IHS's original decision to fund the ICP nor its decision to terminate that program constituted rulemaking under the APA. Thus, under *Overton Park*, agency decisions concerning the discretionary allocation of funds for the provision of services are simply not subject to the procedural requirements that govern promulgation of legislative rules. See also *United States* v. *Cooper*, 699 F. Supp. 69, 74 (W.D. Pa. 1988) (list of placement sites for physicians who have received National Health Service Corps Scholarships is not a rule).

b. The court of appeals compounded its error on this issue by declining to limit itself to the question whether termination of the ICP constituted legislative rulemaking for purposes of the APA. Instead, the court went further, and announced the broad proposition that "notice and comment procedures should be provided *any time* the government 'cuts back congressionally created and funded programs for Indians' even when the Indians have no entitlement to the benefits." App., *infra*, 15a (emphasis added). That proposition represents a radical and unwarranted expansion of rulemaking requirements beyond those imposed by the APA, and is directly contrary to the pronouncements of this Court.

In *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), this Court squarely held that the federal courts have no authority to impose procedural requirements on federal agencies based on considerations of public policy. Under *Vermont Yankee*, a reviewing court is not free to force upon an agency the court's "own notion of which procedures are 'best' or most likely to further some vague, undefined public good." 435 U.S. at 549. Rather, the courts are limited to determining whether the agency has complied with the procedures mandated by the relevant statutes. *Ibid.*

Nothing in the APA provides the slightest support for the court's holding that all agency actions that may adversely affect Indians must automatically be subjected to notice-and-comment procedures. Nor does any other statute or regulation require that agencies providing services to Indians undergo formal notice-and-comment rulemaking before modifying or terminating whatever discretionary programs or services they offer. In particular, neither the Snyder Act nor the IHCIA—the principal statutes relied on by respondents—imposes any such requirement.[11]

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[11] In general, appropriations under the Snyder Act are "gratuitous appropriations of public monies." *Scholder* v. *United States*, 428 F.2d at 1129. IHS regulations make clear that there is no entitlement to particular IHS services and that the health services provided by the agency "to any particular Indian community will depend upon the facilities and services available from sources other than [IHS] and the financial and personnel resources made available to [IHS]." 42 C.F.R. 36.11(c). This published rule describing the contours of the IHS's programs in general terms makes clear that the myriad decisions that must be made in allocating resources under the rule will not themselves take the form of rules.

Likewise, the "special relationship" between Indians and the federal government does not provide any basis for imposing such procedural requirements on agencies. As noted above, pp. 11-12, *supra*, that relationship is not an independent source of specific legal constraints on the actions of the federal government in the absence of any showing that the government's actions will adversely affect Indian property rights or entitlements. Rather, the only specific and enforceable duties owed to Indians by the federal government in this context are those that are statutorily derived. Since no statute or regulation imposes the extraordinary notice-and-comment requirement adopted by the court of appeals in this case, the court's holding was in direct violation of *Vermont Yankee*.[12]

c. The court of appeals believed that its rulemaking requirement was compelled by *Morton* v. *Ruiz*, 415 U.S. 199 (1974). However, *Ruiz*, which was decided

[12] Congress has, by statute, directed the IHS to consult with Indian tribes before making certain decisions. For example, the IHS is required by the 1988 amendments to the IHCIA to consult with the affected Indian tribe before building, renovating, or closing Indian health facilities. See Indian Health Care Amendments of 1988, Pub. L. No. 100-713, § 301, 102 Stat. 4812-4813. In addition, the BIA informs us that it has issued non-binding guidelines for consulting with Indian tribes on certain personnel management decisions. Thus, the fact that notice-and-comment rulemaking procedures need not be followed before the IHS or BIA revises or terminates discretionary programs does not necessarily mean that those agencies will act without taking into account the comments of Indians. In fact, direct consultation with the affected Tribes may often be a more effective way of receiving their input than would publication of a proposal in the *Federal Register* and inviting written submissions to an office in Washington, D.C.

before *Vermont Yankee*, did not even address the question of notice-and-comment procedures, and it provides no support for the broad principle announced by the court of appeals.

Ruiz involved a challenge to a provision of the BIA's unpublished internal manual that limited eligibility for general assistance benefits to those Indians living "on" reservations. Finding that Congress had permitted those benefits to be available to Indians living on *or near* reservations, 415 U.S. at 230, the Court held that the BIA's adoption of a narrower eligibility standard was invalid because BIA had not published that standard, in violation of its own rules requiring publication of eligibility requirements. *Id.* at 235-236.

The BIA manual provision at issue in *Ruiz* prescribed binding future standards governing an individual Indian's eligibility for whatever level of general assistance benefits the BIA furnished. That provision therefore was reasonably regarded as a "rule," because it was an "agency statement" of "future effect." In fact, it may well have constituted a legislative rule of the sort that the APA requires to be preceded by notice-and-comment rulemaking procedures. The Court did not, however, address that issue; instead, as the Court noted, the BIA's decision to ignore its own requirements for publication of such standards rendered the eligibility requirement unenforceable. *Id.* at 235-236. *Ruiz* thus does not suggest that *all* agency decisions adversely affecting Indians—especially those that are not even "rules"—must be subjected to the full panoply of procedural requirements applicable to legislative rules; to the contrary, the Court's decision clearly rested on the determination that the Manual provision was in fact an attempt

to impose a rule of personal eligibility on individual Indians without following the necessary procedures.

This case, by contrast, does not involve personal eligibility for IHS services.[13] It involves the allocation of staff and other resources within IHS and the general level and type of services that will be made available at particular locations. Nothing in *Ruiz* suggests that notice-and-comment procedures must be followed in that setting.[14]

3. The decision of the court of appeals warrants review by this Court. As a practical matter, the court's decision is likely to have significant deleterious effects on the administration of Indian programs. The IHS, for example, delivers health care to more than one million Indians and Alaska Natives nationwide. See R. Walke, *Federal Programs of Assistance to Native Americans*, S. Prt. No. 62, 102d Cong., 1st Sess. 140 (1991). Moreover, the court's reliance on legislative history of appropriations Acts to justify judicial review where no Act of Congress furnishes

[13] That subject is separately addressed by existing IHS regulations. See 42 C.F.R. 36.12.

[14] In explaining its result, the *Ruiz* Court also referred to the federal government's duty to deal fairly with the Indians. 415 U.S. at 236. The Court did so, however, only after first satisfying itself that Congress had made Indians living near reservations eligible for benefits and that the Manual provision was the type of standard for which publication was required. The Court then referred to the "trust" responsibility to Indians in explaining why it was particularly suitable to enforce that mandate, holding that "[b]efore benefits may be denied to these otherwise entitled Indians, the BIA must first promulgate eligibility requirements according to established procedures." *Ibid.* The Court did not hold that the "trust" responsibility furnished an independent source of procedural requirements.

standards for a court to apply, and its apparent approval of the district court's all-encompassing definition of rulemaking, has serious implications for the proper development of administrative law outside the context of Indian affairs.

The IHS and other agencies routinely provide Congress with considerable detail on programs and expenditures when they submit justifications for appropriations to Congress. For example, in the 1983 hearings on which the court of appeals relied (App., *infra*, 11a-12a), the IHS discussed not only the ICP, but also specific clinics and hospitals, repairs to facilities, staff housing problems, and alcoholism and urban health projects. See *Department of the Interior and Related Appropriations for 1984: Hearings Before the Subcomm. on the Dep't of the Interior of the House Comm. on Appropriations*, 98th Cong., 1st Sess. Pt. 3, at 331-418 (1983). These programs are frequently mentioned in committee reports. See *id.* at 350-358. Indeed, many, if not most, IHS programs are " 'cognized' by Congress in its appropriations process." App., *infra*, 15a n.7. The court of appeals' decision apparently requires notice-and-comment procedures for any decision to terminate or relocate such services, vastly increasing the time and expense of adjusting agency operations in response to ever-changing needs and resource availability.[15] The practical effect of the court's decision may well be to render such agencies incapable of modifying services in response to budget cutbacks, because the fiscal year

[15] The burdens and delays imposed by the decision below should not be underestimated. The Department of Health and Human Services, for example, informs us that it takes between one and two years from the time a decision to promulgate a legislative rule is made until the final rule takes effect.

in which the cutbacks occur may well have expired before a final rule implementing those cutbacks can take effect. Review by this Court is therefore necessary to correct the fundamentally erroneous principles of administrative procedure and judicial review announced by the Tenth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-2235

GROVER VIGIL, CHARLENE VIGIL, as General Guardians and Next Friends for ASHLEY VIGIL, a minor person, KEE SANDOVAL, JUDY SANDOVAL, as General Guardians and Next Friends for KRISTOFFERSON SANDOVAL, a minor person, ANGELA ALLEN, as General Guardian and Next Friend for ANGELO ALLEN, a minor person, individually and on behalf of all other persons similarly situated, PLAINTIFFS-APPELLEES,

vs.

EVERETT R. RHOADES, M.D., Director of the Indian Health Service, his agents, employees, and successors, OTIS R. BOWEN, Secretary of the Department of Health and Human Services, his agents, employees, and successors, THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DONALD O. HODEL, Secretary of the Department of the Interior, his agents, employees, and successors, ROSS SWIMMER, Assistant Secretary of the Interior-Indian Affairs, BUREAU OF INDIAN AFFAIRS, UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS.

Appeals from the United States District Court
for the District of New Mexico

(D.C. No. 86-1182-JB)
746 F. Supp. 1471

[Filed Jan. 15, 1992]

Before SEYMOUR, BARRETT and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

The government appeals from the district court's grant of summary judgment in favor of the Plaintiffs-appellees, a certified class of handicapped Indian children who have received or will be eligible to receive clinical services from the Indian Health Service (IHS) pursuant to the Indian Children's Project (Project). The IHS is an agency within the Department of Health and Human Services. It began the Project in the late 1970's in conjunction with the Bureau of Indian Affairs (BIA), a Department of the Interior agency, in order to provide clinical services to handicapped Indian children residing in the southwestern United States. In 1985, the IHS decided that Project staff would be better utilized as consultants to other IHS programs nationwide. IHS subsequently terminated the Project clinical services and reassigned its staff without affording notice and comment procedures.

The Plaintiffs brought this suit seeking declaratory and injunctive relief. They claimed that the ter-

mination of services violated the federal trust responsibility to Indians, the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.*, the Snyder Act, c. 115, 42 Stat. 208 (1921) (codified as amended at 25 U.S.C. § 13), the Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified as amended at 25 U.S.C. §§ 1601-83), various agency rules and regulations, and their Fifth Amendment due process rights. Plaintiffs moved for partial summary judgment, Fed. R. Civ. P. 56(c), and the government moved for dismissal for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), or, in the alternative, summary judgment. The district court held that the termination was subject to judicial review and, as a legislative rule, was subject to the APA's notice and comment procedures as set forth at 5 U.S.C. § 553. *Vigil v. Rhoades*, 746 F. Supp. 1471 (D.N.M. 1990). Given the IHS's concession that it did not provide notice and comment, the district court employed a traditional equitable analysis and granted affirmative injunctive relief requiring the IHS to reinstate the Project. *Id.* at 1483-87.

The government argues that (1) the termination was not judicially reviewable under the APA because it was committed to agency discretion, 5 U.S.C. § 701(a)(2), or, in the alternative, (2) the termination was not subject to notice and comment procedures under the APA because it was not a legislative rule, *id.* § 553, and (3) the termination was not arbitrary and capricious or an abuse of discretion under the APA, *id.* § 706(2)(A). We find no error in the district court's analysis, *see* 746 F. Supp. 1471, and we affirm the judgment.

I. Background

The background of the Indian Children's Project is clouded in bureaucratic haze. Nevertheless, we recount it here largely from undisputed facts in the record and Congressional hearings testimony. The Project was funded pursuant to two Acts of Congress, the Snyder Act, 25 U.S.C. § 13, and the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. §§ 1601-83. The Snyder Act, Congress' formal legislative authorization for Indian welfare, requires the Secretary of Health, Education and Welfare to "direct, supervise, and expend [Congressional appropriations] for the benefit, care, and assistance of the Indians throughout the United States for . . . relief of distress and conservation of health." 25 U.S.C. § 13.[1] In addition, Title II of the IHCIA provides for supplemental appropriations for several broad categories of Indian health care, including "mental health." 25 U.S.C. § 1621(a)(4)(D). Under the mental health provision, Congress authorized the IHS to establish "[t]herapeutic and residential treatment centers." *Id.* These centers were to come about pursuant to "a major cooperative care agreement between the IHS and the BIA using suitable BIA facilities in convenient locations." H.R. Rep. No. 1026, 94th Cong., 2d Sess. 81 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2652, 2719.

Congress did not fund the treatment centers for disturbed children; however, the IHS allocated $292,000

[1] The Snyder Act encompasses other Indian programs and initially concerned only Bureau of Indian Affairs spending, but the Indian Health Facilities and Hospitals Act, c. 658, § 1, 68 Stat. 674 (1954) (codified as amended at 42 U.S.C. § 2001), transfers authority for Indian health care to the Secretary of Health, Education and Welfare.

and 11 positions from its fiscal year 1978 general IHCIA Title II appropriation to the IHS Headquarters mental health branch in Albuquerque, New Mexico for the planning and development of a handicapped children's project, the Indian Children's Project. The Project then began providing services to handicapped Indian children partially in an effort to assess the need for a treatment center—instead of using BIA facilities as Congress had envisioned, the IHS planned on constructing its own diagnostic and treatment center. IHS later requested a $3.5 million appropriation from Congress for the center. *Department of the Interior and Related Agencies Appropriations for 1980: Hearings before the House Subcommittee on the Department of the Interior*, 96th Cong., 1st Sess., pt. 8 at 245-252. Congress did not fund the center, but appropriated $300,000 for fiscal year 1980 to the IHS for development and expansion of the Project to a national level in Conjunction with the BIA.[2]

[2] The House Report regarding the appropriation bill states:

> In addition, the Committee has provided an increase of $300,000 for expansion of the handicapped children's program. The Funds will be used to provide diagnostic service to children with complex problems who reside nationwide and who require a sophisticated medical treatment for their disorders.

H.R. Rep. No. 374, 96th Cong., 1st Sess., 82-83 (1979).

The Senate report states:

> The Committee concurs in the House increases of . . . $300,000 to widen diagnostic, health and education services for handicapped children. The current handicapped program budgeted at $292,000 is little more than a consulting service for the Albuquerque, N. Mex., area. Under a cooperative agreement with the Bureau of Indian Affairs, which is to provide facilities, transportation and educational services, the program should expand to

BIA began participating in the Project in 1979 by allocating $350,000 of year-end funds for contract services. By 1980, the BIA and IHS had entered a memorandum of agreement which provided for a joint effort to serve handicapped Indian children through direct or contracted clinical treatment. App., Ex. 6. Apparently, the effort to persuade Congress to fund a treatment center was forgotten, and the Project staff concentrated primarily on diagnosis and treatment of handicapped Indian children in the Southwest. This effort continued on a regional basis until IHS terminated direct clinical services in August 1985. As of August 1985, the staff was following 426 handicapped children. BIA continues to follow handicapped Indian children pursuant to its educational responsibilities under the Education for All Handicapped Children Act of 1975 (EAHCA), Pub. L. No. 94-142, 89 Stat. 774 (codified as amended at 20 U.S.C. §§ 1400 *et. seq.*). The government contends that Plaintiffs are eligible for a "comprehensive array" of services pursuant to the EAHCA; however, the record contains no documentary evidence that services comparable to the former Project services are available in the reservation communities of the 426 children followed as of August 1985.

II. Disposition

Pursuant to the APA, any person legally aggrieved by a final agency action presumptively is entitled to judicial review thereof. *See* 5 U.S.C. §§ 702, 704 (provisions regarding presumptive review and finality respectively). Nevertheless, a federal district

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one offering short-term residential care and referral services better designed to meet the health needs of Indian Children from all areas of the Nation.

S. Rep. No. 363, 96th Cong., 2d Sess. 91 (1979).

court's subject matter jurisdiction over an APA claim arises under 28 U.S.C. § 1331. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 317 n.47 (1979) (citing *Califano v. Sanders*, 430 U.S. 99 (1977)). This jurisdiction, however, is not without exception. The APA provides that an agency action is reviewable "except to the extent that—(1) statutes preclude judicial review; or (2) [the] agency action is committed to agency discretion by law." 5 U.S.C. § 701. If either APA preclusion applies, federal subject matter jurisdiction under 28 U.S.C. § 1331 does not exist. *See Califano*, 430 U.S. at 105 (§ 1331 jurisdiction subject to federal "preclusion-of-review statutes"). *See also Robbins v. Reagan*, 780 F.2d 37, 57 (D.C. Cir. 1985) (Bork, J., dissenting). In its Fed. R. Civ. P. 12(b)(1) motion, the government argued that IHS's Project termination decision fell under the § 701 (a)(2) preclusion for actions "committed to agency discretion by law." We review this jurisdictional argument de novo. *See Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 641 (10th Cir. 1990). We also review the summary judgment determination de novo, using the same standard as the district court. *Osgood v. State Farm Mut. Auto Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988). Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The parties agree that no material factual disputes exist in this case; the arguments are strictly legal.

The Supreme Court has stated that the § 701 (a)(2) preclusion of judicial review for matters committed to agency discretion is "very narrow." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). It applies only "in those rare instances

where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " *Id.* (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). In *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), the Court elaborated on the issue in the context of the Food and Drug Administration's decision not to enforce certain federal statutes. The *Chaney* Court held that judicial review of an agency nonenforcement decision is not available unless Congress clearly indicates to the contrary. *Id.* at 838. This is so because of the "general unsuitability for judicial review of agency decisions to refuse enforcement." *Id.* at 831. Such decisions are unsuitable for review in part because Congress normally does not provide "meaningful standards for defining the limits of [enforcement] discretion." *Id.* at 834. Although the *Chaney* Court dealt with a nonenforcement decision, it set forth a principle applicable to all agency actions—"review is not to be had if the statute is drawn so that a court could have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830. Even after *Chaney*, however, the general exception to judicial review "for action 'committed to agency discretion' remains a narrow one." *Id.* at 838.

The Court's most recent pronouncement on this issue came in *Webster v. Doe*, 486 U.S. 592 (1988), a case dealing with the Central Intelligence Agency Director's decision to terminate an employee for purported security reasons. The *Webster* Court stressed the need for a careful examination of the language and structure of the statutes which provide the basis for the alleged agency illegality. *Id.* at 600. The Court also noted that agency regulations, in the absence of meaningful statutory standards, may provide a basis for review. *Id.* at 602 n.7. In that case, the

language of the National Security Act of 1947 (NSA) § 102(c), 50 U.S.C. § 403(c), provided unfettered discretion to the Director of Central Intelligence to terminate any employee, and the overall structure of the NSA revealed an overriding need for security in the CIA employment process. *Webster*, 486 U.S. at 600-01. Furthermore, the agency's own regulations allowed for maximum discretion. *See id.* at 602 n.7. Under the circumstances, the Court found no manageable standards with which to review the employment termination and therefore applied the § 701(a)(2) exception.[3]

Since *Webster* this court has had ample opportunity to apply the § 701(a)(2) exception.[4] The government, however, relies primarily on one case, *Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347 (10th Cir. 1989) [hereinafter *CALC*], in support of its argument that the Project termination in this case is unreviewable. In *CALC*, we examined the language and structure of the Head Start Act

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[3] The *Webster* Court, however, held that colorable constitutional claims were reviewable in the absence of clear Congressional intent to the contrary. 486 U.S. at 603. *See also Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347, 353 (10th Cir. 1989) ("judicial review of colorable constitutional claims remains available unless Congress has made its intent to preclude review crystal clear") [hereinafter *CALC*]. We need not address this issue in this case because the Plaintiffs' constitutional claims are not before us given our disposition of the case.

[4] *See, e.g., Selman v. United States*, 941 F.2d 1060 (10th Cir. 1991); *American Bank, N.A. v. Clarke*, 933 F.2d 899 (10th Cir. 1991); *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634 (10th Cir. 1990); *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990); *CALC*, 866 F.2d 347; *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988).

(HSA), Pub. L. No. 97-35, Title VI, §§ 635 *et seq.*, 95 Stat. 499 *et. seq.* (1981) (codified as amended 42 U.S.C. §§ 9831-58), as well as its underlying regulations, *see, e.g.*, 45 C.F.R. §§ 1303.33(b), 1303.36(b), in search of manageable standards with which to review the termination of funding of a local Head Start grantee. The Department of Health and Human Services had terminated funding for the grantee largely because of a vexatious political dispute between the grantee and the local Head Start policy council. *See CALC*, 866 F.2d at 353-54. We found no manageable standards in the applicable statutes and regulations, and we emphasized the unsuitability for judicial review of agency funding decisions: "Funding determinations are 'notoriously unsuitable for judicial review, for they involve the inherently subjective weighing of the large number of varied priorities which combine to dictate the wisest dissemination of an agency's limited budget.'" *Id.* at 354 (quoting *Alan Guttmacher Inst. v. McPherson*, 597 F. Supp. 1530, 1536-37 (S.D.N.Y. 1984), *aff'd*, 805 F.2d 1088 (2d Cir. 1986)). *See also International Union, United Autoworkers v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) ("A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit."), *cert. denied*, 474 U.S. 825 (1985).

The government contends that the termination of the Project services in this case is similar to the grant termination in *CALC*, that is, a mere funding determination which is unsuitable for judicial review. Indeed, specific manageable standards for reviewing the funding termination are difficult to find in the Snyder Act, the EAHCA and the IHCIA, three

sources relied upon by the district court as "ample 'law to apply.'" *See* 746 F. Supp. at 1477. The Plaintiffs have not cited any statute or regulation which even refers to the Project or provides specific standards for reviewing its termination. Perhaps this is due to the complex background of the Project. As the government contends, the Project appears to have been created at the discretion of the IHS in furtherance of the Congressional intent expressed in the Snyder Act and the IHCIA provision for "[t]herapeutic and residential treatment centers" as described in the IHCIA at 25 U.S.C. § 1621(b)(4)(D).[5] *See supra* pp. 4-5. And it is difficult to see a correlation between the Project as it was upon termination in 1985 and the treatment centers envisioned by Congress. Nevertheless, the district court was correct in finding that Congress "had learned of the existence of the Program and cognized that fact in fashioning its Indian-related appropriations . . . ." *See* 746 F. Supp. at 1477.

We have examined Congressional hearings testimony and reports from 1980, the year Congress appropriated $300,000 for the Project, *see supra* note 2 and accompanying text, through 1985, the year IHS terminated the Project. Each year, IHS represented to Congress that it was funding the Project in order to provide services for handicapped Indian children. For example, for fiscal year 1984, IHS represented to a House appropriations subcommittee that:

> The *Indian Children's Program* (ICP) continues to function as a regional interagency IHS-BIA/

[5] The district court noted that the parties could not agree on the proper source of funding of this project. 746 F. Supp. at 1472 n.1. We have found it no less difficult to discern the source of funding of the project.

Office of Indian Education Programs (OIEP) project serving emotionally, educationally, physically and mentally handicapped American Indian children and youth in the southwest. For individual children, the ICP is providing diagnostic, evaluation, treatment planning and followup services. For parents, community groups, school personnel and health care personnel, the ICP is providing training in child development, prevention of handicapping conditions, and care of the handicapped child . . . . This activity responds to continued congressional interest in a national collaboration on behalf of handicapped children . . . . Financially the ICP is supported by both IHA [*sic*] and BIA/OIEP in an approximate 65-35 ratio. IHS . . . funds are expended under the mental health budget activity. Additional IHS funding appropriated by Congress in FY 1980 is expended under the hospitals and clinics budget activity.

Department of the Interior and Related Agencies Appropriations for 1984: Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 98th Cong., 1st Sess., pt. 3, 351 (1983) (narrative Mental Health Budget Justification report submitted to subcommittee). In response, the subcommittee report states:

> *Indian Children's Program* . . . the Committee is pleased to hear of the continued success of the Indian Children's Program, and expects IHS to include information in next year's budget justification regarding its participation and details of funds to be provided to this effort.

Id. The IHS made similar representations in the form of testimony and narrative submissions before

the same subcommittee for each year that the Project existed.[6]

The government contends that these snippets of Congressional hearings testimony and subcommittee reports do not constitute manageable standards for review. Yet, at a minimum, the hearings testimony and reports clearly demonstrate that Congress was informed of and intended to fund the Project, albeit through general appropriations, throughout the Project's entire existence. This is unlike *CALC*; whereas *CALC* involved a termination of the funding of one grantee among hundreds involved in the Head Start program, this case involves the summary termination of the program itself.

The Congressional intent to fund the Project, in combination with the special relationship between the Indian people and the federal government, strongly suggests a jurisdictional basis for review. In *Vigil v. Andrus*, 667 F.2d 931 (10th Cir. 1982), we relied on Congressional hearings testimony and reports in finding that Congress was aware of a BIA school lunch program and intended that all Indian school children, regardless of family income, be eligible for participation in the program—this, in spite of a general appropriation and lack of specific statutory man-

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[6] *See, e.g., Department of the Interior and Related Agencies Appropriations for 1985: Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives*, 98th Cong., 2d Sess., pt. 3, at 486 (narrative submission describing the continuation of Project); *Appropriations for 1983*, 97th Cong., 2d Sess., pt. 3, at 167 (same); *Appropriations for 1982*, 97th Cong., 1st Sess., pt. 9, at 70-74 (testimony of Dr. Emery A. Johnson, Director, IHS); *Appropriations for 1981*, 96th Cong., 2d Sess., pt. 3, at 632 (narrative submission describing continuation of Project). *See also supra*, note 2 (regarding appropriations for fiscal year 1980).

date for a school lunch program. BIA had transferred its lunch program to the Department of Agriculture, and, in the process, Department of Agriculture maximum family income requirements had eliminated many Indian children from eligibility. Interpreting the leading Supreme Court case in the area of Indian welfare programs, *Morton v. Ruiz*, 415 U.S. 199 (1974), we stated that "the government has assumed almost a guardian-ward relationship with the Indians by its treaties with the various tribes and its assumption of control over their property. This suggests that the withdrawal of benefits from Indians merits special consideration." *Andrus*, 667 F.2d at 936. *See generally Felix S. Cohen's Handbook of Federal Indian Law*, ch. 3, § C2c, 225-228 (1982) (discussing federal administrative trust responsibility to Indians, noting that "ordinary standards of a private fiduciary must be adhered to by executive officials administering Indian . . . programs"). *Compare Kenai Oil & Gas, Inc. v. Dept. of the Interior*, 671 F.2d 383, 386 (10th Cir. 1982) ("fiduciary responsibilities vested in the United States as trustee of Indian lands" provided adequate basis for judicial review).

It suffices to state that this "special consideration" provides an appropriate backdrop for judicial review of the agency action, particularly in light of Congress' recurring budgeting recognition of the Project. When the government "depriv[es] the Indians of benefits that have long been provided them, [it] must 'bend over backwards' to assure fair treatment." *Andrus*, 667 F.2d at 939. Given this overriding duty of fairness and the Snyder Act's general provision for "the relief and conservation of health," 25 U.S.C. § 13, it was appropriate for the district court to exercise jurisdiction. *See* 746 F. Supp. at 1478 (district

court correctly states that Snyder Act's general purpose provides "a palpable question: whether the action ultimately does redound to the 'benefit, care and assistance' of Indians").[7]

Moreover, the district court was correct in holding that APA notice and comment proceedings were necessary in this case. *See* 746 F. Supp. at 1479-83. The case is indistinguishable from *Andrus*, in which we held that *Ruiz*, 415 U.S. 199, stands for the proposition that notice and comment procedures should be provided any time the government "cuts back congressionally created and funded programs for Indians" even when the Indians have no entitlement to the benefits. *Andrus*, 667 F.2d at 936. The government attempts to distinguish *Andrus*, contending that it dealt only with an eligibility for benefits requirement, a "classic rule," whereas this case involves a simple reallocation of resources. Government's brief at 35. This argument, however, was answered very clearly in *Andrus*:

> *Ruiz* specifically focused on the BIA's duty to be fair in informing the Indians of changes in eligibility requirements for general assistance benefits, but the case may be read more broadly

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[7] In *Sierra Club v. Yeuter*, 911 F.2d 1405, we held that one of the general purposes of the Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131-36), "to preserve [the] wilderness character" of subject lands, *id.* § 1133(b), did not provide us with a manageable standard of review. 911 F.2d at 1415-16. The government contends that the general purpose of the Snyder Act likewise does not provide a manageable standard. *Sierra Club v. Yeutter*, however, is readily distinguishable from this case; it did not involve the federal government's general trust duty to Indians, and it did not involve a specific project "cognized" by Congress in its appropriations process.

> to require the BIA to follow rulemaking procedures whenever it cuts back congressionally created and funded programs for Indians.

667 F.2d at 936. As we have already decided, the Project was Congressionally created and funded, and there is no question that benefits were "cut back;" the entire program was eliminated. Therefore, rulemaking procedures should have been followed.[8]

Exercising de novo review over the district court's summary judgment determination, we find no error in its analysis of the rule making issue. *See* 746 F. Supp. at 1479-83. The Plaintiffs were legally entitled to relief, and therefore, summary judgment was appropriate. Regarding the form of relief, reinstatement of the Project, *see id.* at 1483-87 (supplemental opinion), we express no opinion because the government has not raised the issue.

AFFIRMED.

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[8] The government also contends that *Andrus* is distinguishable because it dealt only with an exception to the rule making requirements, not with the issue of whether the challenged agency action was a rule. The government is correct in defining the issue of *Andrus*; the case dealt with the "grants, benefits, or contracts" exception, 5 U.S.C. § 553(a)(2), to APA rulemaking provisions. 667 F.2d at 935. However, the distinction is unavailing, for implicit in the exceptions issue is the existence of a rule.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 86-1182-JB

GROVER VIGIL and CHARLENE VIGIL as General Guardians and Next Friends for ASHLEY VIGIL, a minor person,

-and-

KEE SANDOVAL and JUDY SANDOVAL as General Guardians and Next Friends for KRISTOFFERSON SANDOVAL, a minor person,

-and-

ANGELA C. ALLEN, as General Guardian and Next Friend for ANGELO ALLEN, a minor person, individually and on behalf of all other persons similarly situated, PLAINTIFFS,

v.

EVERETT R. RHOADES, M.D., Director of the Indian Health Service, his agents, employees, and successors; OTIS R. BOWEN, Secretary of the Department of Health and Human Services, his agents, employees, and successors; THE DEPARTMENT OF HEALTH AND HUMAN SERVICES; DONALD O. HODEL, Secretary of the Department of the Interior, his agents, employees, and successors; ROSS SWIMMER, Assistant Secretary of the Interior-Indian Affairs, Bureau of Indian Affairs, United States Department of the Interior, his agents, employees, and successors; THE DEPARTMENT OF THE INTERIOR; and the UNITED STATES OF AMERICA, DEFENDANTS.

MEMORANDUM OPINION AND ORDER

[Filed Jul. 6, 1990]

THIS MATTER is before the Court on the Motion for Partial Summary Judgment filed December 30, 1987 by Plaintiffs, the Motion to Dismiss and in the Alternative for Summary Judgment Based on Lack of Jurisdiction filed December 30, 1987 by "federal" defendants and joined and supplemented February 3, 1988 by "interior" defendants, all responses thereto, and all replies to the responses. Having reviewed the pleadings, the evidence of record and the relevant law, the Court finds that Defendants' motions are not well taken and will be denied, and that Plaintiffs' motion is well taken and will be granted with relief limited to that set forth herein.

Over the extended history of this litigation, virtually no operative fact has escaped dispute by the parties. The Court's careful scrutiny of the record places at least this much beyond controversy: Using funds appropriated pursuant to the Snyder Act,[1] 25 U.S.C. § 13, the Bureau of Indian Affairs ["BIA"] and the Indian Health Service ["IHS"] jointly established and, for a time, operated, the Indian Children's Program ["Program"]. This was an undertaking that directly provided a variety of health care support services to certain handicapped Indian children.

[1] Denying that the Snyder Act was the sole funding authority, Plaintiff adverts as well to the Indian Health Care Improvement Act, 25 U.S.C. § 450-450(n) (1982, Supp. II 1984, and Supp. III 1985) ["IHCIA"] (also referenced by parties as Pub. L. 94-437), and to the Education for All Handicapped Children Act, 20 U.S.C. §§ 1400 *et seq.* (1982, Supp. I 1983, Supp. II 1984, Supp. III 1985) ["EAHCA"] (also referenced by parties as Pub. L. 94-142).

The array of services included identification and diagnosis of the children and their handicaps, development and monitoring of treatment plans, "consultative visits" in children's home communities, training, and some clinical services such as physical therapy. Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 1-3; Memorandum in Support of Defendants' Motion to Dismiss at 15-18. The Program was in place at least in preliminary form as early as 1979. *See, e.g.*, Memorandum in Support of Defendants' Motion to Dismiss, Exhibit "G" [Hearings Before the House Subcommittee on Appropriations, Department of the Interior and Related Agencies Appropriations for 1980, 96th Cong., 1st Sess., pt. 8, at 245-52]. The evolving contours and exact details of the Program and its manner of operation are intricate and will be discussed only as relevant to the Court's individual rulings *infra*.

Over a period of several months beginning in July 1985, the Program was terminated,[2] apparently at the immediate instance of IHS officials Kreuzberg and Vanderwagen. The termination was effected in a manner that Defendants concede did not comport with the requirements of the Administrative Proce-

[2] *See* Memorandum in Support of Defendants' Motion to Dismiss at 23-24, Exhibit "S" [July 1985 Memorandum from Pierce and Makowski], Exhibit "T" [August 1985 Memorandum from Pierce and Makowski]. While not denying that the Program was "terminated" as such, Defendants characterize the atcion at issue as "a decision made by the Indian Health Service (IHS) to discontinue consultative patient services provided by the IHS component of what was the Indian Children's Program, a joint pilot project in the southwest co-administered by the IHS and the Bureau of Indian Affairs (BIA)." Memorandum in Support of Defendants' Motion to Dismiss at 1.

dure Act ["APA"], *see* Memorandum in Support of Defendants' Motion to Dismiss at 46, the applicability of which is one of the questions now before the Court. As of the termination of direct Program services in 1985, it was "currently following" some 426 children. Deposition of Sanchez at 44-46. According to Defendants, the decision to terminate the Program involved "redirecting staff efforts into a national data gathering and technical assistance role for the benefit of all IHS Areas and Service Units throughout the country." Memorandum in Support of Defendants' Motion to Dismiss at 2.

Plaintiffs thereafter commenced this action for declaratory and injunctive relief against the United States; the Department of the Interior, of which the Bureau of Indian Affairs is an agent; the Department of Health and Human Services, of which the Indian Health Service is an agent; and various officials of these entities. In particular, Plaintiffs seek a judicial declaration that the termination violated the federal trust responsibility to Indians, the Administrative Procedure Act, the Fifth Amendment, the Snyder Act, the Indian Health Care Improvement Act, and various other "rules and regulations;" and that the termination was arbitrary and capricious, an abuse of agency discretion, and contrary to law. Plaintiffs accordingly request an injunction compelling Defendants to provide essential health care support services to Plaintiffs and compelling Defendants to withdraw their termination of the Program. Plaintiffs also request "mandamus relief" compelling Defendants to: 1) undertake public notice and comment procedures before again terminating the Program; 2) implement a system to ensure optimum health for handicapped Indian children at service units in the Southwest; and 3) "develop and

implement a national level policy with respect to their obligation to provide health and medical services to handicapped Indian children." Plaintiffs are a stipulated class consisting of:

> all handicapped Indian children who in the past received, or who presently are, have been, or will be eligible to receive health services from the Indian Health Service in the Albuquerque area, Navajo area, and Hopi reservation portion of the Phoenix area, including health services formerly available through the Indian Children's Program.

Vigil v. Rhoades, Civil No. 86-1182-JB, Order [certifying class pursuant to Fed. R. Civ. P. 23(b)] (D.N.M. June 22, 1987).

Plaintiffs develop two theories in their bid to have the Court set aside the termination of the Program under the judicial review powers afforded by the Administrative Procedure Act ["APA"]. They are, broadly: 1) that the termination violated the federal government's trust duty to Indians as expressed generally and in a number of statutory schemes particularly the Snyder Act, the Education for All Handicapped Children Act, and the Indian Health Care Improvement Act; and, 2) that the manner of the termination violated the "notice and comment" provisions of the APA. Plaintiffs also claim that the termination violated their Fifth Amendment right to due process.[3] Plaintiffs move for summary judgment

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[3] In addition, The Complaint and Plaintiffs' moving papers disclose an ill-developed attempt to proceed *directly* under the doctrine of federal trust responsibility to Indians. Given its rulings, *infra*, the Court need not address the viability of such an approach.

as to certain of their requests for relief and on all but their constitutional claims.[4] Defendants move for dismissal, arguing that Plaintiffs lack standing; that Plaintiffs fail to state a claim for relief because they lack specific substantive entitlement to Program services and hence assert no deprivation of any legally protected right; and that Plaintiffs are not entitled to the judicial review they seek. Alternatively, Defendants seek summary judgment upholding the termination as having a rational basis and as not being contrary to law, 5 U.S.C. § 706(2)(a), and determining that Plaintiffs' constitutional claims must fail for lack of any legitimate claim of entitlement to the services or procedure Plaintiffs seek.

The parties have framed substantial questions respecting Plaintiffs' standing to sue and the availability of judicial review of the administrative action terminating the Program. The Court resolves the standing issues in Part I of this Opinion and the reviewability issues in Part II. In Part III, the Court proceeds to the determination whether the termination of the Program violated the Administrative Procedure Act.

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[4] Specifically, Plaintiffs "move the Court for a partial summary judgment declaring . . . that Defendants owe a special trust duty to Plaintiffs; . . . that Defendants have violated their special trust obligations to Plaintiffs by terminating the ICP [and by doing so] without providing Plaintiffs with notice and an opportunity to be heard; [and] that Defendants have violated the publication and rule-making requirements of the Administrative Procedure Act, 5 U.S.C. §§ 552, 553 (1982, Supp. III 1985)." Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment at 4.

I.

Of threshold significance are the Interior Defendants' tardily advanced arguments that the Plaintiff class is without standing to sue them. The arguments of these Defendants implicitly fuse the standing inquiry with the assessment of legal sufficiency of a claim under Federal Rule of Civil Procedure 12(b)(6). They must therefore be assessed with respect to both standards.

In general, "question[s] of standing in federal courts [are] to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.'" *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970). In assessing questions of standing to bring suit challenging administrative action, the applicable analysis is twofold. The first inquiry is whether Plaintiffs have alleged that the challenged action has caused them "injury in fact, economic or otherwise." *Id.* at 152. Then, the Court must determine whether "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153.

In contrast, a motion to dismiss under Rule 12(b)(6) focuses on the legal cognizability of a claim of injury. When considering a motion to dismiss, the material allegations of the Complaint must be accepted as true. *Franklin v. Meredith*, 386 F.2d 958, 959 (10th Cir. 1967). The complaint is not to be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); (emphasis added). The Court shall construe the pleadings liber-

ally, and if there is any possibility of relief the case should not be dismissed. *Gas-a-Car, Inc. v. American Petrofina, Inc.* 484 F.2d 1102, 1107 (10th Cir. 1973).

One of Interior Defendants' contentions is, in essence, that they never undertook to provide services to the entire Plaintiff class and hence did not injure it "in fact" when the Program was terminated. The Interior Defendants contend alternatively that they were under no legal duty to provide services to the entire Plaintiff class and hence inflicted no legally actionable harm when the Program was terminated. In support, these Defendants note that the only eligible beneficiaries of BIA health support services would be those handicapped Indian children who "attend BIA enrolled schools." *See* 25 C.F.R. 45.1. Thus, Interior Defendants contend, because there are members of the stipulated class who do not "attend BIA enrolled schools," *see* Interior Defendants' Supplemental Memorandum in Support of Defendants' Motion to Dismiss at 7, Plaintiffs' classwide claim for services against the BIA is without legal basis. Moreover, they reason, because the BIA alone could not have *lawfully* served the entire Plaintiff class, BIA sponsorship of the Program does not justify the inference that the BIA did undertake to serve the entire class. Interior Defendants further contend that those class members who do attend BIA schools now receive all the health care and support services to which they are entitled through another BIA program called ISET funded pursuant to Pub. 94-142 [5] or, for preschool Indian children ages 3-5 on reservations, through yet another BIA program. According to Interior Defendants, those who instead attend public schools receive all the services they are due from

[5] *See supra* note 1.

the public systems in which they are enrolled, also pursuant to Pub. L. 94-142. Interior Defendants thereupon conclude that no member of Plaintiff class has suffered or complains of any actionable injury at their hands.

This threshold attack on Plaintiffs' claims is grounded on a misconception of what the term "joint" means in the context of the participation of the BIA and IHS in the terminated venture. As Interior Defendants' position would have it, notwithstanding that both entities are conceded to have simultaneously sponsored the Program, each was implicitly tendering itself as "providing for" only that subset of the serviced children fitting within the literal meaning of that entity's governing statutes and regulations. Thus, the inchoate argument proceeds, because the reach of the specific statutory and regulatory provisions governing either of the two agencies alone is not so inclusive as to encompass the entirety of Plaintiff class, neither agency can properly be subject to any one of Plaintiffs' *classwide* claim against it.

This result flows from a view of the controversy that is artificial and logically awkward, and more importantly, insufficiently substantiated. Indeed, Plaintiffs' allegations and the essentially uncontested evidence in the record are to the effect that the participation of the two agencies was truly joint and was never represented otherwise—was, as a practical matter, administratively unitary, predicated on a relationship in which each agency was acting as agent for the other, and providing services in a combination and manner that neither agency alone could have offered.[6]

[6] *See, e.g.*, Memorandum in Support of Defendants' Motion to Dismiss at 14, Exhibit "K" [1980 Report on Project Activity], Exhibit "L" [1980 Memorandum Agreement]; *see*

Regardless of what Defendants claim to be the scope of their *statutory* mandate, they do not deny that the Program was a jointly sponsored enterprise that in fact delivered services to Plaintiff class members not actually enrolled in BIA schools, *see, e.g.*, Memorandum in Support of Defendants' Motion for Summary Judgment at 16, and that the Program has now been terminated, *see* Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Exhibit 5 at 38; *see also* Memorandum in Support of Defendants' Motion to Dismiss at 3 ("The ICP pilot project no longer exists.") *Cf. Morton v. Ruiz*, 415 U.S. 199, 212 (1974) (relying on BIA's past practice as potential constraint on its future action, notwithstanding apparently permissive mandate of Snyder Act). In all, the Court finds unavailing Defendants' sponsorship-based attacks on Plaintiffs' standing and on the legal sufficiency of their claims.

Defendants' attack alternatively seeks to demonstrate failure of the "injury in fact" component of standing by alleging that Plaintiffs continue to receive health support services, albeit through different programs. Again, however, the only reasonable inference

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also Memorandum in Support of Defendants' Motion to Dismiss at 16 ("The ICP service population included not only BIA school children for whom BIA had Pub. L. 94-142 responsibilities, but also any Indian child from birth to age 21 eligible for IHS services and suspected of having a handicapping condition"); Memorandum in Support of Defendants' Motion to Dismiss at 7-9, Exhibit "B" [January 1978 Johnson Letter], Exhibit "C" [November 1977 Johnson Letter]. In characterizing the Program as a "joint pilot study project," Memorandum in Support of Defendants' Motion to Dismiss at 15, Defendants further undercut their adherence to the view that the Program had a "BIA component" somehow functionally isolable from the "IHS component."

from the record evidence supporting Plaintiffs' essentially unrebutted allegations is that since termination of the Program, class members have not been offered or have not been able to avail themselves of an array of assertedly essential health care services as extensive as that which the Program had provided. *See, e.g.*, Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 5, 8, 11, Exhibit 2 [Affidavit of Julia Sells, P.T.]; Attachment 1 to Declaration of Margaret A. Wilson, R.P.T., at 2.

As applied to the case at bar, the final phase of the standing analysis stirs no real controversy. Plaintiffs' claimed injury is "arguably within the zone of interests" sought to be protected by the body of law Plaintiffs invoke. *Association of Data Processing Service Organizations*, 397 U.S. at 153. Plaintiffs assert adverse effects upon their physical health as the result of Defendants' actions, and they do so with reference to an imposing body of law encompassing the Snyder Act, the statutory foundation for the Indian Health Service, and cases establishing the government's special duty of diligence as trustee in implementing these and other more particularized laws respecting the welfare of Indians. Plaintiffs, as Indians, are precisely the intended beneficiaries of this body of law.

Defendants inappropriately insist that Plaintiffs invoke an overt and textually precise statutory basis for each of their specific claimed entitlements to services, *see, e.g.*, Interior Defendants' Reply to Plaintiffs' Response at 3. In so doing, they essentially import *legal* sufficiency arguments into the assessment of standing, breeding confusion. Even more fundamentally, they commit themselves to a narrow, grudging view of the federal trust duty that departs significantly from the notion of that duty as evolved in the courts. In par-

ticular, such cases as *Vigil v. Andrus*, 667 F.2d 931 (10th Cir. 1982) make clear that an agency as trustee cannot summarily discontinue support services it has undertaken to provide to Indians and thereafter assert as justification that these services were, in a legal sense, gratuitous.

Furthermore, the Court finds that dismissal as to the BIA would be improvident. In retaining the BIA as party, the Court ensures that any decree that may be ultimately entered "is not thwarted by the omission of a[n] . . . agency that might by inaction hamper the carrying out of its provisions."[7] *Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir. 1985). In all, the Court finds no deficiency in Plaintiffs' showing of their standing to challenge the administrative action here at issue. *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

By parity of reasoning Defendants' arguments are equally ineffectual at showing that Plaintiffs fail to state a claim for relief. As in Defendants' argument as to standing, the object is apparently to establish that Defendants owe Plaintiffs no legal duty of the sort Plaintiffs are seeking to enforce. As already indicated, Plaintiffs assert that they suffered harm resulting from a reviewable agency rulemaking action—from the substance of that action and the manner in which it was taken. The Court finds no legally essential element missing in Plaintiffs' claim seeking judicial review of Defendant agencies' actions as having violated their statutory duties to Plaintiffs, as having been taken in violation of APA procedural requirements, and as having deprived Plaintiffs of their due process rights protected by the Fifth Amendment.

[7] Indeed, the legislative history of the IHCIA clearly demonstrates that Congress had *contemplated* "a major cooperative care agreement between the IHS and the BIA." H.R. Rep. No. 1026, 94th Cong., 2d Sess., Pt. 1 at 80-81, *reprinted in* 1976 U.S. Code Cong. and Admin. News 2718-19; *see also id.* at 94-95. As discussed *infra*, however, the Court today need not decide whether Congress, by this or any other expression, ultimately "ratified" the ICP as actually implemented.

II.

Equally untenable is Defendants' contention, upon which they seek dismissal, that judicial review of the action terminating the Program is not available to Plaintiffs. Plaintiffs are entitled to judicial review of the termination unless that action is within the "very narrow exception" for actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *see also Califano v. Sanders*, 430 U.S. 99 (1977). Except under certain circumstances not present here, *see, e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (where issue is agency's refusal to take enforcement action, "the presumption is that judicial review is not available"), there is a presumption *in favor of* judicial review, and the exception for "agency discretion" is to be construed narrowly. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). The Supreme Court has recently acknowledged that the presumption of reviewability has deep roots in some of that Court's earliest pronouncements on the role of the judiciary. *Bowen*, 476 U.S. at 670 (quoting *Marbury v. Madison*, 1 Cranch 137, 163 (1803) ("[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.")).

Accordingly, the burden of proving nonreviewability falls heavily upon the party asserting it. *Sierra Club v. Hodel*, 848 F.2d 1068, 1075 (10th Cir. 1988). The narrow exception in § 701(a)(2) precludes judicial review only when the law delineating the agency's authority is so vague or generalized that, as a practical matter, there is "no law to apply" by the reviewing Court in assessing the propriety of the agency's specific action. *See Citizens to Preserve Overton Park*, 401 U.S. at 410.

The Court concludes that the exception for actions "within agency discretion" does not apply here. Plaintiffs are correct that there is ample "law to apply" to actions of these agencies, including the Snyder Act, the EAHCA, the IHCIA, cases setting the contours of the federal government's trust duty to Indians, and significantly, evidence suggesting that Congress had learned of the existence of the Program and cognized that fact in fashioning its Indian-related appropriations in succeeding fiscal years.[8] *See Andrus*, 667 F.2d at 934-35. While the statutes are general, they are nonetheless fully explicit enough to enable a reviewing court to determine whether the agencies they bind are "ignor[ing] clear jurisdictional, regulatory,

[8] *See, e.g.*, Memorandum in Support of Defendants' Motion to Dismiss, Exhibit "G" [Hearings Before the House Subcommittee on Appropriations, Department of the Interior and Related Agencies Appropriations for 1980, 96th Cong., 1st Sess., Pt. 8 at 245-52] (Members responding favorably during briefing on ICP, reported as already being partly implemented). Further, as Defendants concede, "Congress did add $300,000 to the IHS appropriation for fiscal year 1980 to expand the ICP into a nationwide effort under a cooperative agreement with the BIA." Memorandum in Support of Defendants' Motion to Dismiss at 12 (discussing H.R. Rep. No. 374, 96th Cong., 1st Sess., at 82-83).

statutory, or constitutional commands." *Heckler v. Chaney*, 470 U.S. at 839 (Brennan, J., concurring).

For example, even the broadest of these statutes, the Snyder Act, imports some intelligible standard against which to measure agency conduct. That Act provides that "the Bureau of Indian Affairs . . . shall direct, supervise, and expend such moneys as Congress may . . . appropriate, for the benefit, care, and assistance of the Indians . . . for relief of distress and conservation of health." 25 U.S.C. § 13. These statutory parameters suffice to ensure that the Court, asked to review a given agency action, is presented with a palpable question: whether the action ultimately does redound to the "benefit, care and assistance" of Indians. In particular, the reviewing Court would be called upon to consider whether the action ultimately does work the "relief of distress and conservation of health" or whether, on the other hand, it defeats congressional purposes or flouts the legislative mandate. *See Robbins v. Reagan*, 780 F.2d 37, 45-46 (D.C. Cir. 1985). A statutory command of this breadth confers broad discretion upon the agency to apply its peculiar expertise in determining *how* to achieve its mandated objective and in optimally allocating scarce resources to this end, but the breadth of the command does not imply discretion to act in a manner that ignores or disserves the objective. *Id.; see Heckler*, 470 U.S. at 839 (Brennan, J., concurring); *see also Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 620-23 (D.C. Cir. 1987), *vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987) (suggesting also that a finding that the agency action was not "committed to agency discretion"—and is therefore reviewable on the merits—is not prerequisite to reviewability for "lawlessness"). Indeed, the narrow-

ness of the "no law to apply" exception is such that actions taken pursuant to some remarkably broad statutory mandates have been pronounced "reviewable." *See, e.g., Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988) ("A court can measure whether the improvement of [a local road] will 'impair the suitability of [Wilderness Study Areas] for preservation as wilderness' or will cause 'unnecessary or undue degradation.' "); *Moapa Band of Paiute Indians v. United States Department of Interior*, 747 F.2d 563 (9th Cir. 1984).

Moreover, Defendants' narrow view of what may be considered "law to apply" [9] is not the prevailing one. "Law to apply" is a protean concept and, at least with respect to the threshold determination of reviewability, has been acknowledged to encompass far more than simply the organic act creating the agency.[10]

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[9] Although, in arguing the question of reviewability, Defendants insist that only the relatively generalized Snyder Act might constitute "law to apply," in a different context they implicitly concede otherwise: "The IHS action has a rational basis and does not violate *the Snyder Act or IHCIA, the Federal trust responsibility to Indians, the Administrative Procedure Act, or plaintiffs' constitutional rights to due process.*" Memorandum in Support of Defendants' Motion to Dismiss or for Summary Judgment at 31 (emphasis added).

[10] *See, e.g., Morton v. Ruiz*, 415 U.S. 199 (1974) (adopting as norms, for purposes of review on the merits, agency's past practice and its representations to Congress); *State of Iowa v. Block*, 771 F.2d 347, 348-51 (8th Cir. 1985), *cert. den.*, 478 U.S. 1012 (1986) ("law to apply" deemed to include legislative history, a GAO report, and case law concerning judicial review of administrative action); *Cardoza v. Commodity Futures Trading Commission*, 768 F.2d 1542 (7th Cir. 1985) ("law to apply" includes the agency's own regulations and past practice; also accorded weight is any *tradition* of reviewability of a given type of administrative action); *Vigil v. Andrus*, 667 F.2d 931, 932 (10th Cir. 1982) (APA *procedural* requirements had to be met because of "the government's trust obligations to the Indians [and] the expectation of Congress in making appropriations," even where applicable statutes deemed too broad to give rise to the specific claimed entitlement); *Robbins v. Regan*, 616 F. Supp. 1259, 1276 (D.D.C. 1985), *aff'd*, 780 F.2d 37 (D.C. Cir. 1985) ("law to apply" included statement of Secretary of Health and Human Services, from which agency's subsequent departure was reviewable).

In addition to affirmative legislative expressions, agency action has also been deemed constrained by "[t]raditional principles of rationality and fair process." *Heckler*, 470 U.S. at 853 (Marshall, J., concurring).

In all, the Court concludes that the body of law controlling and guiding these agencies as they embark on such ventures as the Indian Children's Program is not "so devoid of objective benchmarks," *Davis Enterprises v. United States Environmental Protection Agency*, 877 F.2d 1181, 1188 (3d Cir. 1989), or so lacking in "judicially manageable standards," *Heckler*, 470 U.S. at 830,[11] as to consign such actions to the

[11] The type of agency decision *Heckler* found "presumptively unreviewable" due to a lack of "judicially manageable standards" involved assessing "whether agency resources are [to be] spent on this violation or another." *Id.* at 831. Defendants, arguing that the termination was actually a reallocation decision, apparently seek to fit the action here at issue into this category. But any resemblance to *Heckler* is superficial. The *Heckler* Court addressed an agency decision to decline to undertake a specific *enforcement* action on a single occasion, and the Court's language makes clear that it conceived its holding as limited to such a scenario. Here, the complaint is of the termination of an already-active agency program that had served handicapped Indian children, a broad class of beneficiaries.

Nor is this case like *Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347 (10th Cir. 1989), which declined

unreviewable discretion of the agencies. Moreover, the Court finds in the applicable law no " 'clear and convincing evidence' of a . . . legislative intent [that] the courts restrict access to judicial review." [12] *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *see also Heckler*, 470 U.S. at 840-55 (Marshall, J., concurring).

Nonetheless, for reasons discussed immediately *infra*, the purposes of this ruling require only that the Court recognize the presence of this extensive and broad legal substrate as the essence of its finding of reviewability. The Court today is not faced with any ripe question of applying this body of law to the administrative action at issue for assessment of the action's substantive validity under the "arbitrary and capricious," "substantial evidence," or "unwarranted by the facts" standards prescribed by 5 U.S.C. § 706(2).[13] Thus, the Court intimates no view on what the outcome of any such assessment might be.

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to review an administrative decision to withdraw funding from a local Head Start unit over that unit's handling of a personnel matter. The administrative decision in *Laramie* was reached after notice and an extended hearing. In contrast, the case at bar concerns the summary termination of an entire service-providing support program.

[12] To conclude otherwise in a case such as this would be tantamount to "frustrat[ing] Congressional intent" that agencies be held to their legislatively-prescribed missions. *Cf. Cardoza v. Commodity Futures Trading Commission*, 768 F.2d 1542, 1549 (7th Cir. 1985).

[13] *Cf. Vinil v. Andrus*, 667 F.2d 931 (10th Cir. 1982), which apparently undertook substantive review of a BIA program termination action without treating the threshold question of the termination's reviewability *vel non*, and therefore must implicitly have assumed or concluded that the termination was reviewable. *Andrus* found the termination procedurally

III.

At the next logical threshold is the "difficult but familiar" determination, *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980) whether the action terminating the Progrem was subject to the "notice and comment" requirements of the Administrative Procedure Act, 5 U.S.C. § 553, which Defendants concede were not followed.[14] This is one of the issues as to which Plaintiffs specifically seek summary judgment.

A motion for summary judgment properly may be granted only in cases where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant bears the burden of demonstrating the ab-

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invalid, and although it ultimately found no Indian entitlement to continuation of the program in its extant form, it so concluded on arriving at a factual finding of "Congress's knowledge of the . . . program *and Congress's apparent desire to shift funding of the school lunch program to another agency.*" *Id.* at 935 (emphasis added). Thus, one net effect of *Andrus* is that APA procedural requirements may be fully applicable to an action terminating or transforming a program even in the absence of a court finding of some substantive entitlement to continuation of that program.

In this case as in *Andrus*, the Court may properly decide whether the Program termination was subject to APA procedural requirements, although it is not prepared, as was the court in *Andrus*, to decide the substantive entitlement issue. In contrast with *Andrus*, nothing in the current record compels this Court to conclude that Congress desired or would have found unexceptionable the termination action of which Plaintiffs complain.

[14] *See* Memorandum in Support of Defendants' Motion to Dismiss, Exhibit "S"; *see also id.* at 25 n.17. Moreover, the parties do not dispute that the decision process did not include any participation by the BIA—one of the two sponsoring agencies.

sence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Houston v. Nat'l General Ins. Co.*, 817 F.2d 83 (10th Cir. 1987). The Court must view the record in the light most favorable to the existence of triable issues. *Exnicious v. United States*, 563 F.2d 418 (10th Cir. 1977). When the nonmoving party will have the burden of proof at trial on a dispositive issue, it is required to respond by designating specific facts showing there is a genuine issue for trial. *Id.* at 324. In ruling on a motion for summary judgment, the Court does not weigh the evidence but rather asks whether, on the evidence before it, a reasonable jury could return a verdict for the nonmoving party. *Dreiling v. Peugeot Motors of America, Inc.*, 850 F.2d 1373, 1377 (10th Cir. 1988).

To answer the question whether the "notice and comment" provisions of the APA apply, the Court must first determine whether the sponsoring agencies' termination of the Program was "rulemaking," and if so, whether it involved "substantive" or "legislative" rules as opposed to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A); *Batterton*, 648 F.2d at 701. Faced with such a gauntlet of categories, this Court is mindful that "[a]nalysis that improves upon semantic play must focus on the underlying purposes of the procedural requirements at issue." *Batterton*, 648 F.2d at 703.

The APA rulemaking requirements are animated by several related policies. The notice and comment requirement aims to ensure public participation and fairness to affected parties where agencies hold governmental authority, and to make available to the deciding agency all relevant facts and alternatives.

See id. at 703-04; *see also Tabb Lakes Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989). Indeed, an acknowledged central purpose of the APA is to ensure that "administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Morton*, 415 U.S. at 232. A procedurally inadequate determination to deny benefits to Indians in frustration of their "legitimate expectation . . . is inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Id.* at 236 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)). Exceptions to procedural requirements are to be "reluctantly countenance." *See New Jersey v. E.P.A.*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

The Court finds as a matter of law that the termination decision amounts to a "legislative rule," *see Bellarno International Ltd. v. Food and Drug Administration*, 678 F. Supp. 410, 412 (E.D.N.Y. 1988), and is hence subject to the APA rulemaking procedures set forth in 5 U.S.C. § 553, namely, that the decision be attended by advance notice published in the Federal Register, opportunity for interested parties to be heard, and an agency statement of the action's basis and purpose. *See Lewis v. Weinberger*, 415 F. Supp. 652, 661 (D.N.M. 1976). An "agency process for formulating, amending, or repealing a rule," 5 U.S.C. § 551(5), is "rulemaking" subject to rulemaking procedures. A "rule" is:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or pre-

> scribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of . . . facilities, . . . services or allowances therefor . . . or practices bearing on any of the foregoing[.]

5 U.S.C. § 551(4). Thus, as one court has observed, the APA "broadly defines an agency rule to include nearly every statement an agency may make." *Batterton*, 648 F.2d at 700.

The advance publication and public comment requirements apply except to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," 5 U.S.C. § 553 (b)(3)(A), and except where the agency finds, and publishes with the rule, "good cause" to avoid the requirement. 5 U.S.C. § 553(b)(3)(B). However, the requirement that the *final* rule be published thirty days before its effective date applies even to "rules of agency organization, procedure, or practice," 5 U.S.C. § 553(d)(2), again unless the agency finds, and publishes with the rule, "good cause" to avoid the requirement, 5 U.S.C. § 553(d)(3).

The action at issue here, even if characterized as a simple resource reallocation decision, cannot reasonably be considered a repeal of a mere rule of "agency organization, procedure, or practice." An internal agency practice or procedure "is primarily directed toward improving the efficient and effective operations of an agency, *not toward a determination of the rights* [*and*] *interests of affected parties.*" *Batterton*, 648 F.2d at 702 n.34 (emphasis added); *id.* at 708 (the exemption "cannot apply . . . where the agency action trenches on substantial private rights and interests."). Neither can the action be

characterized as a "general statement of policy," which is "merely an announcement of the policy which the agency *hopes to implement* in future rulemakings or adjudications." *Pacific Gas & Electric Co. v. FPC*, 406 F.2d 33, 38 (D.C. Cir. 1974). Finally, the action is clearly more than an "interpretive rule," which simply "serves an advisory function explaining the meaning given by the agency to a particular word or phrase in a statute or rule it administers." *Batterton*, 648 F.2d at 705.

Both "interpretive rules" and "general statements of policy" are marked chiefly by their *non-binding* effect and by the fact that they are "not determinative of issues of rights addressed." *See Batterton*, 648 F.2d at 702. With the record here affording no recourse to any single agency statement as the "pronouncement" which operated to terminate the Program, it is enough to conclude that the termination was of "binding effect" and preserved no "discretion" to continue to provide the array of services formerly provided by the Program.[15] *Cf.*, 678 F. Supp. at 412-15; *see also Batterton*, 648 F.2d at 702. In contrast with rules other than "legislative," it cannot reasonably be doubted that the unilateral decision to terminate the Program purported to "carry the force of law" and, adopting *arguendo* Defendants' policy-based rationale for the termina-

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[15] There is no evidence that the agencies affirmatively provided alternative resources, in mitigation of the termination; rather, the record reveals that former Program patients were "on their own" in seeking such resources as might already be available, with the defunct Program playing at most an advisory role in this process. *See, e.g.*, Memorandum in Support of Defendants' Motion to Dismiss at 25 ("The purpose of the community close out meetings was to do networking, *i.e.*, match children to available services").

tion, that the action sought to "implement congressional intent" or "effectuate statutory purposes." *Batterton*, 648 F.2d at 701; *see* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 10. In that the termination operated to "grant rights, impose obligations, or *produce other significant effects on private interests*," *id.* at 701-02 (emphasis added), it is squarely within the category of "rules" to which rulemaking procedure applies. *Id.* The termination is, therefore, a "legislative rule" and not a mere "general statement of policy" for APA rulemaking purposes. Because "the agency action satisfies the APA's definition of a rule and eludes exemptions to § 553, it is procedurally defective unless promulgated with the procedures required by law." *Batterton*, 648 F.2d at 710.

Furthermore, Defendants' suggestion that the original promulgation of the Program was procedurally faulty or was without specific congressional authorization, even if true, has no effect on the applicability of the notice and comment requirement. *Cf. Andrus*, 667 F.2d at 935 (beneficiaries entitled to pretermination *procedure* even where statutory scheme found not to create any substantive entitlement to the terminated program). The Court must look beyond the agency's characterization of its own actions; the notice and comment requirement operates where agency action has "substantial impact" on the affected parties. *See, e.g., Lewis*, 415 F. Supp. at 661; *see also Andrus*, 667 F.2d at 938 (APA rulemaking procedural requirements applied where the subject action had "an adverse effect that is significant"); *cf. Federal Farm Credit Banks Funding Corporation v. Farm Credit Administration*, 731 F. Supp. 217, 223-24 (E.D. Va. 1990).

A separate publication requirement, *see generally Lewis*, 415 F. Supp. at 658-61, is imposed by 5 U.S.C. § 552(a)(1), which provides:

> Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . substantive rules of general applicability adopted as authorized by law, and statements of general policy and interpretations of general applicability formulated and adopted by the agency[.]

Thus, to be subject to this requirement, the termination need only amount to a "statement of general policy." In fact, the termination is a "legislative rule" which meets and exceeds the definitional standards applicable to a "statement of general policy." *Cf. Batterton*, 648 F.2d at 709-10 n. 89 ("publication under [§ 552(a)], if anything, should be easier to secure than under [§ 553], given the language and purposes of the two statutes.") The centrally relevant finding here has already been made with respect to the rulemaking requirements of § 553: the action at issue represents a decision to cease providing direct health support services to a significant number of beneficiaries, and as such effects "a direct and significant impact upon the substantive rights of the general public or a segment thereof." *Lewis*, 415 F. Supp. at 659; *cf. Batterton*, 648 F.2d at 708 n.83. This is a case involving the "substantive right" of Indians to continue receiving the health care services and other support hitherto furnished to them by the very agencies created to fulfill that mission. *See Andrus*, 667 F.2d at 939 ("when depriving the Indians of benefits that have long been provided them, the government must 'bend over backwards' to assure fair treat-

ment."). In addition, the termination decision implicates the agencies' responsibility in "creating reasonable classifications and eligibility requirements to aid in allocating limited funds for Indian welfare services," *Lewis*, 415 F. Supp. at 659 (citing *Morton*, 415 U.S. at 230-31 (1973)), and its publication serves as a check against arbitrariness and as a guide for public expectations, *id.* at 660-61.

Finally, this Court's conclusion that the perfunctory termination of the Program was procedurally inadequate is bolstered by the special solicitude the Supreme Court has prescribed in those situations in which an agency decision amounts to a *change of course*:

> [R]evocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to proper course. . . . Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 41-42 (1983); *see also Robbins*, 616 F. Supp. at 1275 ("such a requirement . . . is necessary to protect the honor and integrity of government" and is not limited to published rules and regulations.). The case at bar, both according to the record and by Defendants' own admissions, involves just such an agency "change of course."

Given this Court's conclusion that the termination action was subject to procedural requirements which it undisputedly failed to meet, Plaintiffs' bid for substantive review of the merits of the termination presents no question ripe for this Court's decision, *see Bellarno*, 678 F. Supp. at 416; *see also Lewis*, 415 F. Supp. at 662. Without the benefit of the enriched record resulting from proper public notice and comment at the administrative level, the Court would be called upon to "decide this issue in the abstract," for "[o]nly after these rule making procedures are completed is the court equipped to decide whether a legislative rule is arbitrary, capricious or issued in excess of statutory authority." *Id.* at 416. Alternatively, because an agency is not entitled to take final rulemaking action without first executing § 553 procedures, action not taken in this manner is untimely and must be deemed to remain subject to the agency's modification, recall, abandonment, or reconsideration —rendering judicial review premature. *Id.* Thus, instead of undertaking substantive review immediately, an appropriate course would be to declare the termination action invalid and order the Program reinstated. *See* 5 U.S.C. § 706(2)(D); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979). Then, if a party wishes to challenge substantively any future termination of the Program, it may do so after the termination has been promulgated in a procedurally valid manner. *Cf. Batterton*, 648 F.2d at 711.

The Court concludes and declares that the decision to terminate the Indian Children's Program is ineffective for lack of publication in the Federal Register and for noncompliance with the rulemaking procedures of the APA. 28 U.S.C. § 2201; 5 U.S.C. §§ 706(2)(D), 552(a)(1), 553; *see also Lewis*, 415 F. Supp. at 661. For reasons discussed *supra*, the Court today need not and does not reach any of the parties' many remaining arguments, including Plain-

tiffs' constitutional attacks and their apparent attempt to proceed directly under the doctrine setting forth the federal trust duty to Indians.

Logic favors immediate reinstatement of a program terminated in violation of law. *Cf. Alexander v. Hillman*, 296 U.S. 222 (1935). Plaintiffs seek this result as part of the injunctive relief they request in the Complaint. However, because Plaintiffs' motion for summary judgment is a partial one limited to their requests for declaratory relief, Plaintiffs have developed no argument addressed to the issuance of an injunction—with the result that Defendants have had no meaningful opportunity to oppose one. Accordingly, the Court is constrained to order supplemental briefing on this issue before proceeding further. *See* 28 U.S.C. § 2202 ("Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.").

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss for Lack of Jurisdiction and in the Alternative For Summary Judgment, and that same Motion as joined and supplemented by Interior Defendants, be, and hereby is, DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Partial Summary Judgment is GRANTED insofar as the Court declares that the decision to terminate the Indian Children's Program is unlawful, and therefore ineffective, for lack of publication in the Federal Register

and for noncompliance with the rulemaking procedures of the Administrative Procedure Act.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that within fifteen days from the date of this Memorandum Opinion and Order, the parties shall submit supplemental briefs addressed solely to the question whether an injunction should issue compelling reinstatement of the Indian Children's Program as it existed and functioned immediately prior to its termination in 1985.

DATED this 5th day of July, 1990.

/s/ Juan G. Burciaga
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 86-1182-JB

GROVER VIGIL and CHARLENE VIGIL as General Guardians and Next Friends for ASHLEY VIGIL, a minor person,

—and—

KEE SANDOVAL and JUDY SANDOVAL as General Guardians and Next Friends for KRISTOFFERSON SANDOVAL, a minor person,

—and—

ANGELA C. ALLEN, as General Guardian and Next Friend for ANGELO ALLEN, a minor person, individually and on behalf of all other persons similarly situated, PLAINTIFFS,

v.

EVERETT R. RHOADES, M.D., Director of the Indian Health Service, his agents, employees, and successors; OTIS R. BOWEN, Secretary of the Department of Health and Human Services, his agents, employees, and successors; THE DEPARTMENT OF HEALTH AND HUMAN SERVICES; DONALD O. HODEL, Secretary of the Department of the Interior, his agents, employees, and successors; ROSS SWIMMER, Assistant Secretary of the Interior-Indian Affairs, Bureau of Indian Affairs, United States Department of the Interior, his agents, employees, and successors; THE DEPARTMENT OF THE INTERIOR; and the UNITED STATES OF AMERICA, DEFENDANTS.

MEMORANDUM OPINION AND ORDER

[Filed Aug. 28, 1990]

THIS MATTER is before the Court on the Supplemental Memoranda filed by Plaintiffs and Defendants pursuant to this Court's July 6, 1990 Memorandum Opinion and Order ["July 6 Opinion"] in which the parties were directed to tender additional submissions addressed solely to the question whether an injunction should issue compelling reinstatement of the Indian Children's Program ["Program"] as it existed and functioned immediately prior to its termination in 1985. The relevant facts were set forth in the July 6 Opinion and need not be repeated. Having reviewed the pleadings, the evidence of record and the relevant law, the Court now determines, in its discretion, that the decree contemplated in the July 6 Opinion will be entered.

Preliminarily, even before reaching the analysis that traditionally governs questions of equitable relief, the case for the injunction is compelling. Absent a decree compelling reinstatement of the Program, the significance of the declaratory relief already ordered by the Court would be more symbolic than real —a state of affairs which would contravene the bedrock remedial principle that courts should "decree complete relief." *Alexander v. Hillman*, 296 U.S. 222, 242 (1935). In addition, the ongoing illegality that arose from the Program's improper termination, *Vigil v. Rhoades*, No. 86-1182-JB, Memorandum Opinion and Order (D.N.M. July 6, 1990), cannot rationally be deemed cured without the Program being again in

operation. Indeed, this straightforward notion is implicit at several points in the statutory schemes applicable here and in the cases elaborating them. *See, e.g.*, 5 U.S.C. § 706(2)(D) ("court *shall* . . . set aside [procedurally invalid] agency action") (emphasis added); 28 U.S.C. § 2202; *Anderson v. Butz*, 550 F.2d 459 (9th Cir. 1977); *Prows v. United States Department of Justice*, 704 F. Supp. 272 (D.D.C. 1988); *Lewis v. Weinberger*, 415 F. Supp. 652 (D.N.M. 1976); *see also Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 819 (1987) (where the requirements of the Administrative Procedure Act are not met, a court can properly vacate the offending rule and restore the *status quo ante*).

In fact, the same ultimate result follows under the traditional equity analysis regarding which the parties have now had opportunity to submit fuller argument. A request for injunctive relief is addressed to the Court's discretion. *See Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). To focus this discretion, courts have inquired, first, whether the movant has demonstrated the lack of an adequate remedy at law. *See, e.g., Beacon Theatres v. Westover*, 359 U.S. 500, 506-07 (1959). Typically, the movant demonstrates the inadequacy of any legal remedy by showing that it will suffer irreparable harm if the Court does not intervene and prevent the impending inquiry. *Cf. City of Chanute v. Kansas Gas & Electric Co.*, 754 F.2d 310 (10th Cir. 1985); *see also Otero Savings and Loan Ass'n v. Federal Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981) ("irreparable injury" showing required for preliminary injunction). Having found that Plaintiffs have succeeded on the merits of their underlying claim that termination of the Program was procedurally invalid, *Vigil v. Rhoades*, Civil No. 86-1182-JB, Memorandum Opinion and Order at 28-30 (D.N.M. July 6, 1990), the Court can next proceed to the determination whether the balance of equities favors the granting of injunctive relief, whether an injunction would be adverse to the public interest, and what particular form any injunctive relief should take. *See Sierra Club v. Alexander*, 484 F. Supp. 455, 471 (N.D.N.Y. 1980), *aff'd*, 633 F.2d 206 (2d Cir. 1980); *see also Otero Savings and Loan Ass'n v. Federal Reserve Bank*, 665 F.2d 275 (10th Cir. 1981) (preliminary injunction).

Plaintiffs have produced abundant and uncontroverted evidence that the Plaintiff class has suffered and will continue to suffer irreparable harm—in particular, impaired health and development—without the services the former Program provided. Moreover, failure to reinstate the Program would irreparably harm Plaintiffs' interest in ensuring that the integrity of the administrative rulemaking process is maintained and that they are afforded a meaningful opportunity to comment before implementation of rules such as that which terminated the Program. *See Community Nutrition Institute v. Butz*, 420 F. Supp. 751, 757 (D.D.C. 1976); *Dow Chemical, USA v. Consumer Product Safety Commission*, 459 F. Supp. 378, 395, *on rehearing*, 464 F. Supp. 904 (W.D. La. 1978). Both of these interests of Plaintiff class are also specific embodiments of weighty and well-established public interests. *See* 25 U.S.C. § 13; 25 U.S.C. § 1602; *Morton v. Ruiz*, 415 U.S. 199, 232, 236 (1974); *Dow Chemical*, 459 F. Supp. at 395.

As to balancing the equities, Defendants make no viable showing that reinstatement of the Program would effect any hardship—to themselves or to the

general public—outweighing the principal benefit of such reinstatement: furtherance of Plaintiffs' interest in obtaining the fullest possible array of essential diagnostic, evaluation, treatment planning and therapy services. Defendants' supplemental brief is preoccupied with attacking the July 6 Opinion, at the notable expense of its treatment of the specific question on which the Court had ordered further submissions. Defendants' attempt to reargue their case before this Court is as unavailing[1] as it is inappropriate.

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[1] The Court observes in passing that Defendants both ignore and mischaracterize the reasoning in the July 5 Opinion. For example, Defendants squander several pages taking the Court to task in the apparent and mistaken belief that the Court relied *solely* on its findings concerning the impact of the rule in determining it to be legislative. In so doing, moreover, Defendants fail to take account of case law in which the impact of a rule was not deemed "irrelevant" to the determination whether notice and comment requirements ultimately applied. *See, e.g., Carribean Produce Exchange, Inc. v. Secretary of Health and Human Services*, 893 F.2d 3, 8 (1st Cir. 1989) (citing *Levesque v. Block*, 723 F.2d 175, 182 (1st Cir. 1982)) ("substantial impact" is "a factor" particularly in assessing whether agency action sought to have "legislative" significance); *American Hospital Association v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (finding "substantial impact" not alone determinative, but citing as subject to notice and comment requirements the adoption of parole guidelines "calculated to have a substantial effect on ultimate parole decisions"); *Id.* at 1047 (focus of inquiry broader than, but still inclusive of, substantiality of impact); *Id.* at 1058-62 (Mikva, J., concurring in part and dissenting in part); *Prows v. United States Department of Justice*, 704 F. Supp. 272, 276-77 (D.D.C. 1988) (rulemaking procedures applicable where the action "substantially affect the rights of those subject to it"); *see also Vigil v. Andrus*, 667 F.2d 931, 939 (10th Cir. 1982) ("the BIA acted improperly in failing to follow APA rulemaking procedures before adopting changes affecting large numbers of Indian families").

On finally arriving at the issue framed by the Court, Defendants are content to flatly declare: "There are no Synder Act funds appropriated or available to Interior to fund a reinstated ICP." Defendants' Supplemental Brief at 15. This and Defendants' other bald declarations of agency incapacity must not and do not serve to bar entry of appropriate injunctive relief where, as here, the requisites for that relief are met. Moreover, the allegations of incapacity, as Defendants develop them, appear to be specific to the BIA.

Defendants do not say why reinstatement of the Program would entail redirection of any appropriated funds away from "the objects for which the appropriations were made." *Cf.* 31 U.S.C. § 1301(a). Indeed, Defendants vaguely inveigh against wrongful reallocation of "the above described funds which are direct service dollars" while producing virtually nothing in the way of specific facts or monetary figures to support their dire claims of "damage the proposed injunction may cause" them. *Cf. City of Chanute v. Kansas Gas & Electric Co.*, 754 F.2d 310, 312 (10th Cir. 1985). As their attempt to demonstrate such damage, Defendants have crafted a string of unsupported premises and conclusions. Defendants' terse pronouncements—for example, that "Interior defendants would have to terminate current direct educational handicapped services in Papago, Albuquerque, Navajo, Phoenix with several BIA schools, P.L. 93-638 contract schools and P.L. 100-297 grant schools that provide direct educational handicapped services to the BIA eligible population of handicapped Indian children"—appear to rely principally on equally conclusory recitations in the affidavit of Dr. Edwin Cobb. Similarly unfounded is Defendants' lament that "[i]n

order to finance the reestablishment of the BIA portion of ICP, BIA would have to recoup EHA [Education of the Handicapped Act] funds as identified in the application of the local educational area and agencies that service the former ICP population."

Significantly, Defendants mount no effective attack on Plaintiffs' showing that the current array of health care support services available and actually provided to handicapped Indian children does not amount to the equivalent of the unlawfully terminated Indian Children's Program—that members of Plaintiff class are currently receiving less of, or are doing without, a number of services the Program used to provide. It would defy logic to infer that these deficits do not matter simply because the current web of support services might in certain other respects provide more or better care than the Program did. In addition, Defendants do not refute Plaintiffs' proposition that their own resources, as individuals, are more severely constrained than those of the agencies and hence less adequate to the task of securing the relief for which they have demonstrated a need.

Defendants allude to other perceived impediments to a decree reinstating the Program: the prospect of changing the *status quo*, the threat of forced termination of other "handicapped service programs" provided pursuant to statutory schemes, the burden of hearings necessitated by curtailment of existing services, and a need to solicit competitive bids in restoring the Program. Yet Defendants marshal neither facts nor well-grounded legal argument in support of these feared effects and, certainly without such support, none of them would suffice to bar the decree at issue. Finally, Defendants' elliptical argument that *laches* is somehow implicated by Plaintiffs' filing an action a

year after the termination, and therein requesting permanent but not temporary injunctive relief, lacks adequate support in any of their cited cases and is without merit.

It is curious—indeed, incongruous—that Defendants should predicate their premonitions of widescale disaster among existing support structures simply upon the reinstatement of a program that they themselves characterize as "a small staff of IHS headquarters and BIA contract supported professionals and administrative support personnel varying in number from approximately 11 to 16 people." Defendants' Supplemental Brief at 4. In this light, and in view of the terseness and generality of their assertions of potential damage, Defendants' attempt to establish "undue hardship" is disingenuous and wholly unconvincing.

Finally, notwithstanding the redress that the APA scheme clearly commands in this matter, Defendants make no real effort to show either factually or logically that *no* equitable relief could be fashioned that would operate to restore the *status quo ante* without entailing the ills (duplication and deprivation of since-initiated services) they perfunctorily recite. Yet the Court today fashions a decree that bars both needless duplication and curtailment of currently provided services.

The Court shall grant Plaintiffs' request for an injunction reinstating the Indian Children's Program and shall deny Defendants' unsupported request for "a stay pending appeal of the Court's decision." Under Federal Rule of Civil Procedure 65(d), an order granting an injunction "shall be specific in terms" and "shall describe in reasonable detail . . . the act or acts" to be enjoined, so that parties will have ade-

quate notice of what they must do to comply with or implement the injunction. *See Williams v. United States*, 402 F.2d 47 (10th Cir. 1967).

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendant agencies, jointly, by and through Defendant executive officers of these agencies, the Secretary of the Interior and his successors, the Secretary of Health and Human Services and his successors, the Director of the Indian Health Service and his successors, and the Assistant Secretary of the Interior-Indian Affairs and his successors, are hereby enjoined—

1. To reconstitute the Indian Children's Program ["Program"] as it existed and functioned immediately prior to its termination in 1985, and in so doing—

a. To procure the functional equivalent, in number and qualifications, of the former staff of the Program, thereby providing Plaintiffs with a multi-disciplinary team of the same professional credentials, calibre, and staff size as was provided under the former Program; and,

b. To provide Plaintiffs, through the reconstituted Program, with the same services, in type, range, quality, and manner of delivery, as were provided under the former Program;

and,

2. To accomplish this restoration of the Program within 180 days from the date of entry of this decree; and,

3. To, within this 180-day period, contact all those children and their families who were being served by the former Program or were in active Program files at the time the former Program terminated services, notify them of the reinstatement of the Program, and provide them with the immediate opportunity to have their current condition assessed to determine how they may resume their relationship with the Program in the manner best suited to their optimum health and development; and,

4. To continue to operate the Program, as herein described, until such time as it is terminated in accordance with all applicable law.

Provided, that—

1. The reconstituted Program is not required to provide those services available to Plaintiff class, and actually provided to Plaintiff class, through any program in operation under the Education of the Handicapped Act, 20 U.S.C. § 1401 *et seq.*, ["EHA program"] during the time periods that any such EHA program actually provides such services to Plaintiff class; and,

2. At no time hereafter are any EHA program services to be impaired or curtailed on account of any activity undertaken in reconstituting or operating the Program or in performing any other duties under this Decree; and,

3. Defendants are at all times hereafter to perform their duties under this decree with such care, skill, and efficiency as will enable them to minimize disruptions in the provision and de-

livery of services under existing programs and to maximize availability and accessibility of the totality of applicable health care support services to Plaintiff class.

DATED this 28th day of August, 1990.

/s/ Juan G. Burciaga
Chief Judge

APPENDIX C

STATUTORY PROVISIONS INVOLVED

1. The Snyder Act, 25 U.S.C. 13:

§ 13. Expenditure of appropriations by Bureau of Indian Affairs

The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:

General support and civilization, including education.

For relief of distress and conservation of health.

For industrial assistance and advancement and general administration of Indian property.

For extension, improvement, operation, and maintenance of existing Indian irrigation systems and for development of water supplies.

For the enlargement, extension, improvement, and repair of the buildings and grounds of existing plants and projects.

For the employment of inspectors, supervisors, superintendents, clerks, field matrons, farmers, physicians, Indian police, Indian judges, and other employees.

For the suppression of traffic in intoxicating liquor and deleterious drugs.

For the purchase of horse-drawn and motor-propelled passenger-carrying vehicles for official use.

And for general and incidental expenses in connection with the administration of Indian affairs.

Notwithstanding any other provision of this section or any other law, postsecondary schools admin-

istered by the Secretary of the Interior for Indians, and which meet the definition of an "institution of higher education" under section 1201 of the Higher Education Act of 1965 [20 U.S.C.A. § 1141], shall be eligible to participate in and receive appropriated funds under any program authorized by the Higher Education Act of 1965 [20 U.S.C.A. § 1001 et seq.] or any other applicable program for the benefit of institutions of higher education, community colleges, or postsecondary educational institutions.

2. Title II of the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1621 (1982):

SUBCHAPTER II—HEALTH SERVICES

§ 1621. Direct patient care program

(a) Purpose and duration

For the purpose of eliminating backlogs in Indian health care services and to supply known, unmet medical, surgical, dental, optometrical, and other Indian health needs, the Secretary is authorized to expend, through the Service, over the seven-fiscal-year period beginning after September 30, 1976, the amounts authorized to be appropriated by subsection (c) of this section. Funds appropriated pursuant to this section for each fiscal year shall not be used to offset or limit the appropriations required by the Service under other Federal laws to continue to serve the health needs of Indians during and subsequent to such seven-fiscal-year period, but shall be in addition to the level of appropriations provided to the Service under this chapter and such other Federal laws in the preceding fiscal year plus an amount equal to the amount required to cover pay increases and employee benefits for personnel employed under

this chapter and such laws and increases in the costs of serving the health needs of Indians under this chapter and such laws, which increases are caused by inflation.

(b) Employment of personnel during seven-fiscal-year period

The Secretary, acting through the Service, is authorized to employ persons to implement the provisions of this section during the seven-fiscal-year period in accordance with the schedule provided in subsection (c) of this section. Such positions authorized each fiscal year pursuant to this section shall not be considered as offsetting or limiting the personnel required by the Service to serve the health needs of Indians during and subsequent to such seven-fiscal-year period but shall be in addition to the positions authorized in the previous fiscal year.

(c) Amounts and positions authorized for certain specific purpose; authorization of appropriations

The following amounts and positions are authorized, in accordance with the provisions of subsections (a) and (b) of this section, for the specific purposes noted:

(1) Patient care (direct and indirect): sums and positions as provided in subsection (e) of this section for fiscal year 1978, $8,500,000 and two hundred and twenty-five positions for fiscal year 1979, and $16,200,000 and three hundred positions for fiscal year 1980. There are authorized to be appropriated $20,250,000 for the fiscal year ending September 30, 1981, $23,000,000 for the fiscal year ending September 30, 1982, $26,500,000 for the fiscal year ending

September 30, 1983, and $30,500,000 for the fiscal year ending September 30, 1984, and such further additional positions are authorized as may be necessary for each such fiscal year.

(2) Field health, excluding dental care (direct and indirect): sums and positions as provided in subsection (e) of this section for fiscal year 1978, $3,350,000 and eighty-five positions for fiscal year 1979, and $5,500,000 and one hundred and thirteen positions for fiscal year 1980. There are authorized to be appropriated $6,400,000 for the fiscal year ending September 30, 1981, $7,350,000 for the fiscal year ending September 30, 1982, $8,450,000 for the fiscal year ending September 30, 1983, and $9,700,000 for the fiscal year ending September 30, 1984, and such further additional positions are authorized as may be necessary for each such fiscal year.

(3) Dental care (direct and indirect): sums and positions as provided in subsection (e) of this section for fiscal year 1978, $1,500,000 and eighty positions for fiscal year 1979, and $1,500,000 and fifty positions for fiscal year 1980. There are authorized to be appropriated $1,875,000, for the fiscal year ending September 30, 1981, $2,150,000 for the fiscal year ending September 30, 1982, $2,500,000 for the fiscal year ending September 30, 1983, and $2,875,000 for the fiscal year ending September 30, 1984, and such further additional positions are authorized as may be necessary for each such fiscal year.

(4) Mental health: (A) Community mental health services: sums and positions as provided in subsection (e) of this section for fiscal year

1978, $1,300,000 and thirty positions for fiscal year 1979, and $2,000,000 and thirty positions for fiscal year 1980. There are authorized to be appropriated $2,500,000 for the fiscal year ending September 30, 1981, $2,875,000 for the fiscal year ending September 30, 1982, $3,300,000 for the fiscal year ending September 30, 1983, and $3,800,000 for the fiscal year ending September 30, 1984, and such further additional positions are authorized as may be necessary for each such fiscal year.

(B) Inpatient mental services: sums and positions as provided in subsection (e) of this section for fiscal year 1978, $400,000 and fifteen positions for fiscal year 1979, and $600,000 and fifteen positions for fiscal year 1980. There are authorized to be appropriated $750,000 for the fiscal year ending September 30, 1981, $870,000 for the fiscal year ending September 30, 1982, $1,000,000 for the fiscal year ending September 30, 1983, and $1,150,000 for the fiscal year ending September 30, 1984, and such further additional positions are authorized as may be necessary for each such fiscal year.

(C) Model dormitory mental health services: sums and positions as provided in subsection (e) of this section for fiscal year 1978, $1,250,000 and fifty positions for fiscal year 1979, and $1,875,000 and fifty positions for fiscal year 1980. There are authorized to be appropriated $2,350,000 for the fiscal year ending September 30, 1981, $2,700,000 for the fiscal year ending September 30, 1982, $3,100,000 for the fiscal year ending September 30, 1983, and $3,600,000 for the fiscal year ending September 30, 1984,

and such further positions are authorized as may be necessary for each such fiscal year.

(D) Therapeutic and residential treatment centers: sums and positions as provided in subsection (e) of this section for fiscal year 1978, $300,000 and ten positions for fiscal year 1979, and $400,000 and five positions for fiscal year 1980. There are authorized to be appropriated $460,000 for the fiscal year ending September 30, 1981, $525,000 for the fiscal year ending September 30, 1982, $600,000 for the fiscal year ending September 30, 1983, and $690,000 for the fiscal year ending September 30, 1984, and such further additional positions are authorized as may be necessary for each such fiscal year.

(E) Training of traditional Indian practitioners in mental health: sums as provided in subsection (e) of this section for fiscal year 1978, $150,000 for fiscal year 1979, and $200,000 for fiscal year 1980. There are authorized to be appropriated $250,000 for the fiscal year ending September 30, 1981, $285,000 for the fiscal year ending September 30, 1982, $325,000 for the fiscal year ending September 30, 1983, and $375,000 for the fiscal year ending September 30, 1984.

(5) Treatment and control of alcoholism among Indians: $4,000,000 for fiscal year 1978, $9,000,000 for fiscal year 1979, and $9,200,000 for fiscal year 1980. There are authorized to be appropriated $16,500,000 for the fiscal year ending September 30, 1981, $19,000,000 for the fiscal year ending September 30, 1982, $22,000,000 for the fiscal year ending September 30, 1983, and $25,100,000 for the fiscal year ending September 30, 1984.

(6) Maintenance and repair (direct and indirect): sums and positions as provided in subsection (e) of this section for fiscal year 1978, $3,000,000 and twenty positions for fiscal year 1979, and $4,000,000 and thirty positions for fiscal year 1980. There are authorized to be appropriated $5,000,000 for the fiscal year ending September 30, 1981, $5,750,000 for the fiscal year ending September 30, 1982, $6,600,000 for the fiscal year ending September 30, 1983, and $7,600,000 for the fiscal year ending September 30, 1984, and such further additional positions are authorized as may be necessary for each such fiscal year.

(d) Research fund; amount required to be expended

The Secretary, acting through the Service, shall expend directly or by contract not less than 1 per centum of the funds appropriated under the authorizations in each of the clauses (1) through (5) of subsection (c) of this section for research in each of the areas of Indian health care for which such funds are authorized to be appropriated.

(e) Authorization of appropriations

For fiscal year 1978, the Secretary is authorized to apportion not to exceed a total of $10,025,000 and 425 positions for the programs enumerated in clauses (c)(1) through (4) and (c)(6) of this section.

8. Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553:

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency

shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

4. Act of Nov. 27, 1979, Pub. L. No. 96-126, Tit. II, 93 Stat. 954, 973-974:

An Act

Making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1980, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending September 30, 1980, and for other purposes, namely:

* * * * *

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

HEALTH SERVICES ADMINISTRATION

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles III and V and section 757 of the Public Health Service Act, including hire of passenger motor vehicles and aircraft; purchase of reprints; payments for telephone service in private residences in the field, when authorized under regulations approved by the Secretary, $538,874,000: *Provided*, That funds made available to tribes and tribal organizations through grants and contracts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450) shall remain available until September 30, 1981.

INDIAN HEALTH FACILITIES

For construction, major repair, improvement, and equipment of health and related auxiliary facilities, including quarters for personnel; preparation of plans, specifications, and drawings; acquisition of sites; purchase and erection of portable buildings; purchase of trailer; and for provision of domestic and community sanitation facilities for Indians, as authorized by section 7 of the Act of August 5, 1954 (42 U.S.C. 2004a), the Indian Self-Determination Act and the Indian Health Care Improvement Act, $74,302,000, to remain available until expended: *Provided*, That not to exceed $20,000,000 of the amounts collected by the Secretary of Health, Education, and Welfare under the authority of title IV of the Indian Health Care Improvement Act shall be available until September 30, 1981, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, construction of new facilities, or major renovation of existing Indian Health Service facilities).

ADMINISTRATIVE PROVISION,
HEALTH SERVICES ADMINISTRATION

Appropriations in this Act to the Health Services Administration, available for salaries and expenses, shall be available for services as authorized by 5 U.S.C. 3109 but at rates not to exceed the per diem equivalent to the rate for GS-18, for uniforms or allowances therefore as authorized by law (5 U.S.C. 5901-5902), and for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or

management of those functions or activities: *Provided*, That none of the funds appropriated under this Act to the Indian Health Service shall be available for the lease of permanent structures without advance provision therefor in appropriations Act.

* * * * *

5. Act of Oct. 12, 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1837, 1863-1865:

Joint Resolution

Making continuing appropriations for the fiscal year 1985, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * *

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HEALTH SERVICES ADMINISTRATION

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles III and V and section 338G of the Public Health Service Act with respect to the Indian Health Service, including hire of passenger motor vehicles and aircraft; purchase of reprints, purchase and erection of portable buildings, payments for telephone service in private residences in the field, when authorized under regulations approved by the Secretary, $809,927,000: *Provided*, That funds made available to tribes and tribal organizations through

grants and contracts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450), shall remain available until September 30, 1986. Funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall be available until September 30, 1986, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning,, design, construction of new facilities, or major renovation of existing Indian Health Service facilities): *Provided further*, That funding contained herein, and in any earlier appropriations Act, for scholarship programs under section 103 of the Indian Health Care Improvement Act and section 757 of the Public Health Service Act shall remain available for expenditure until September 30, 1986.

INDIAN HEALTH FACILITIES

For construction, major repair, improvement, and equipment of health and related auxiliary facilities, including quarters for personnel; preparation of plans, specifications, and drawings; acquisition of sites, purchase and erection of portable buildings, purchases of trailers and for provision of domestic and community sanitation facilities for Indians, as authorized by section 7 of the Act of August 5, 1954 (42 U.S.C. 2004a), the Indian Self-Determination Act and the Indian Health Care Improvement Act, $62,892,000, to remain available until expended.

ADMINISTRATIVE PROVISIONS,
HEALTH SERVICES ADMINISTRATION

Appropriations in this Act to the Health Services Administration, available for salaries and expenses, shall be available for services as authorized by 5 U.S.C. 3109 but at rates not to exceed the per diem equivalent to the rate for GS-18, and for uniforms or allowances therefor as authorized by law (5 U.S.C. 5901-5902), and for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of those functions or activities: *Provided*, That none of the funds appropriated under this Act to the Indian Health Service shall be available for the initial lease of permanent structures without advance provision therefor in appropriations Acts: *Provided further*, That non-Indian patients may be extended health care at all Indian Health Service facilities, if such care can be extended without impairing the ability of the Indian Health Service to fulfill its responsibility to provide health care to Indians served by such facilities and subject to such reasonable charges as the Secretary of Health and Human Services shall prescribe, the proceeds of which shall be deposited in the fund established by sections 401 and 402 of the Indian Health Care Improvement Act: *Provided further*, That funds appropriated to the Indian Health Service in this Act, except those used for administrative and program direction purposes, shall not be subject to limitations directed at curtailing Federal travel and transportation: *Provided further*, That with the exception of service

units which currently have a billing policy, the Indian Health Service shall not initiate any further action to bill Indians in order to collect from third-party payers nor to charge those Indians who may have the economic means to pay unless and until such time as Congress has agreed upon a specific policy to do so and has directed the IHS to implement such a policy: *Provided further*, That hereafter the Indian Health Service may seek subrogation of claims including but not limited to auto accident claims, including no-fault claims, personal injury, disease, or disability claims, and workman's compensation claims except as otherwise limited by the fourth proviso of this section: *Provided further*, That hereafter, notwithstanding any other law, an Indian tribe may acquire and expend funds, other than funds appropriated to the Service, for major renovation and modernization, including planning and design for such renovation and modernization of Service facilities, including facilities operated pursuant to contract under the Indian Self-Determination and Education Assistance Act (Public Law 93-638) subject to the following conditions:

(1) the implementation of such project shall not require or obligate the Service to provide any additional staff or equipment;

(2) the project shall be subject to the approval of the Area Director of the Service area office involved;

(3) the tribe shall have full authority to administer the project, but shall do so in accordance with applicable rules and regulations of the Secretary governing construction or renovation of Service health facilities; and

(4) no project of renovation or modernization shall be authorized herein if it would require the diversion of Service funds from meeting the needs of projects having a higher priority on the current health facilities priority system.

* * * *

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No. 91-1833

In The

Supreme Court of the United States

October Term, 1992

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, *et al.*,

Petitioners,

vs.

GROVER VIGIL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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3

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the agency's decision to terminate the Indian Children's Program (ICP), an on-going program conducted pursuant to congressional mandate and funding and agency rules governing eligibility and program services which for many years provided a crucial array of clinical and support services to handicapped Indian children with whom the United States has a special relationship, constitutes rulemaking subject to the notice and comment requirements of the APA, 5 U.S.C. § 553.

2. Whether the court of appeals erred in holding that the special relationship between the Indian people and the federal government, the Snyder Act, 25 U.S.C. § 13, and congressional creation and funding of a program providing clinical and support services to handicapped Indian children under the Snyder Act and Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq.*, provide "law to apply" for purposes of judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §.701(a)(2), of the agency's termination of the program's services, where the Snyder Act, the Indian Health Care Improvement Act, the duty of fairness owed to the children under the special relationship which has developed between the United States and Indian people, continued congressional recognition of and funding for the ICP, the Education for All Handicapped Act, 20 U.S.C. § 1400 *et seq.*, the Indian Health Service Manual, and agency rules regarding ICP eligibility provide a judicially administrable standard of review to apply.

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No. 91-1833

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Grover Vigil, *et al.*, hereby oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Petitioners' App., 1a-16a) is reported at 953 F.2d 1225. The opinions of the district court (Petitioners' App. 17a-45a, 46a-56a) are reported at 746 F. Supp.

1471. References herein are to the opinions as reported.

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*; the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. §§ 1601 *et seq.*; and the Indian Health Service Manual are reproduced in Respondents' Appendix, 1a-16a, *infra*. Relevant portions of the Snyder Act, 25 U.S.C. § 13, and Administrative Procedure Act which are found in Petitioners' Appendix at 57a-58a and 63a-66a, are not reproduced.

STATEMENT OF THE CASE

1. The Indian Children's Program (ICP) is a joint program of the Indian Health Service (IHS) and Bureau of Indian Affairs (BIA) which provides clinical and support services to handicapped Indian children. As originally envisioned, the ICP, then referred to as the Indian Children's Project, entailed establishment of therapeutic and residential treatment centers for disturbed Indian children. H.R. Rep. No. 94-1026, 94th Cong., 2d Sess., 80-81, reprinted at 1976 U.S. Code Cong. & Admin. News 2718-2719. As it came to be implemented, the ICP provided an array of services which included identification of handicapped Indian children, diagnosis of their handicaps, development and monitoring of their treatment plans, consultative visits in the children's home communities, training, and clinical services such as physical therapy. ICP services were provided to the children both in their homes and in clinical settings. As the program developed after 1980, long term treatment planning and follow-up of individual clients became an ICP staff priority. In addition to these direct services to handicapped children, the ICP provided training in child development, prevention of handicapping conditions, and care of handicapped children to parents, community groups, school personnel, and health care personnel. This array of services was crucial to enable the children

to reach their optimal level of development.

The IHS decided to terminate these ICP services, announcing its decision to various IHS offices and referral sources on August 21, 1985. ICP services to 426 children who were then active clients of the ICP were ceased as of October 1, 1985. In the six year period prior to its termination, the ICP provided services to approximately 2,405 children.[1] The IHS did not provide written notice of the cessation of these services to any of these children. It terminated these services without affording any notice and comment procedures under the Administrative Procedure Act and without publication in the Federal Register.

The ICP termination resulted in the children no longer being able to obtain the services previously available to them through the ICP. No longer were regular physical therapy, occupational therapy, speech/language therapy, and multi-disciplinary screening and evaluation available. Home parent education and training services to help parents understand how to help their children with their handicapped needs, and referral, follow-up, and on-going case planning and management services were also no longer available. The injury caused to the children was particularly egregious because not only were the children no longer able to obtain these necessary services from the IHS and BIA, these services were generally unavailable in the communities in which they lived, even

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1. A General Accounting Office report issued March, 1990 entitled "Special Education: Estimates of Handicapped Indian Preschoolers and Sufficiency of Services" estimates that of nearly 3,000 handicapped Indian preschool children ages 3 and 4 who live on the 63 Indian reservations in the United States that have BIA schools, only 838 children were receiving special education services in the 1988-89 school year. Based on handicapping condition prevalence rates from enrollment data obtained from BIA schools for the 1986-87 school year, the GAO report estimates that there are 650 handicapped pre-school children in New Mexico and 2,485 in Arizona. The report thus provides a good estimate of the number of handicapped Indian pre-school children in the area served by the ICP who are members of the certified class.

when the children entered school. When the children were preschool age, these services were even less available. See note 1, *supra*.

2. Plaintiffs, a certified class of handicapped Indian children who received or were eligible to receive ICP services, filed this lawsuit on September 26, 1986, seeking declaratory and injunctive relief. They challenged the termination of ICP services as being in violation of the publication requirements of the APA, 5 U.S.C. § 552, the rule-making requirements of the APA, 5 U.S.C. § 553, the Snyder Act, 25 U.S.C. § 13, the Indian Health Care Improvement Act, 25 U.S.C. §§1601 *et seq.*, the federal trust responsibility to Indians, various agency rules and regulations, their due process rights under the Fifth Amendment, and as being arbitrary and capricious, 5 U.S.C. § 706.

The district court granted summary judgment to the children on July 6, 1990. It declared that since the agency never afforded any notice and comment opportunity and failed to publish its decision in the Federal Register the termination of ICP services violated the APA, 5 U.S.C. § 552 and § 553. It held that the ICP termination was subject to judicial review, that it constituted rulemaking, and that it was ineffective for noncompliance with the APA rulemaking and publication requirements. For these same reasons, the district court found it premature and unnecessary to review the children's substantive claims, including their constitutional due process claim and their claim under 5 U.S.C. § 706 that the ICP termination was arbitrary and capricious. On August 28, 1990, the district court issued injunctive relief reinstating the ICP. The government thereafter reconstituted the ICP and it currently continues to provide services as before.

3. The government appealed arguing (1) that the termination was not judicially reviewable under the APA because it was committed to agency discretion under 5 U.S.C. § 701(a)(2);(2) that

the termination was not a legislative rule subject to rulemaking under 5 U.S.C. § 553; and (3) that the termination was not arbitrary and capricious under 5 U.S.C. § 706(2)(A). The government did not appeal the district court's holding that the termination was invalid for noncompliance with the publication requirements of 5 U.S.C. § 552. Nor did the government appeal the injunctive relief granted to the children.

The court of appeals reviewed *de novo* the district court's determination of jurisdiction and its grant of summary judgment to the children. The court of appeals determined that since the ICP was "Congressionally created and funded," received "recurring budget recognition" by Congress, and there exists a "special relationship between the Indian people and the federal government," judicial review was appropriate. 953 F.2d 1225, 1231. The court of appeals also ruled that under *Morton v. Ruiz*, 415 U.S. 199 (1974), notice and comment rulemaking procedures were required because the ICP termination action "cuts back congressionally created and funded programs for Indians." 953 F.2d. 1225, 1231. Finding no error, it affirmed.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because it presents none of the weighty issues postulated by petitioners. Instead, due to the procedural posture of the case, review of one of the questions presented in the petition is premature. The remaining issue presents no conflict among the circuits, and no significant legal question.

1. The petition suggests that the central issue to be reviewed is the determination whether the decision to terminate the Indian Children's Program is committed to agency discretion. However, this issue is not ripe at this juncture. Both the district court and the court of appeals held that the agency erred in terminating the

program without complying with the APA's notice and comment rulemaking requirements, 5 U.S.C. § 553. As the district court recognized, review of the plaintiff's substantive challenges to the termination of the ICP was premature because compliance with the APA's notice and comment rulemaking requirements might lead to a different decision, or a different basis for the same decision. In either event, the need for judicial review of that decision may be obviated, or the basis for such review might be drastically changed.

The "law to apply" determination goes to the court's need to have a "meaningful standard" by which to determine whether an agency action is "arbitrary and capricious" under § 706. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Here, the district court did not make an "arbitrary and capricious" determination because the agency action was found procedurally invalid under the APA. Until the agency first complied with the APA's procedural requirements, it was premature for the court to decide whether the action was "arbitrary and capricious." *Bellarno International v. FDA*, 678 F. Supp. 410 (E.D.N.Y. 1988). Judicial review was proper based on the agency's procedural violations whether or not it was proper under § 701(a)(2) for the purpose of an "arbitrary and capricious" determination. When "an agency violates a procedure mandated by the APA," the agency action "must be set aside" on judicial review. B. Mintz and N. Miller, *A Guide to Federal Agency Rulemaking*, 342 (Administrative Conference of the United States, 1991). Since the "law to apply" issue presents no need for review at this time, the petition should be denied.

In addition, the district court held that the agency violated the publication requirements of 5 U.S.C. § 552. The government appealed only the § 553 ruling. The § 552 ruling and grant of injunctive relief were not appealed and are not presented for review. Since the § 552 ruling provides an independent basis for the injunctive relief granted, the § 553 ruling presents no compelling need for review.

2(a). The unanimous court of appeals and district court correctly decided that the notice and comment rulemaking requirements of the APA, 5 U.S.C. § 553, applied to the termination of the ICP. Rulemaking is intended to ensure that "administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Morton v. Ruiz*, *supra*, at 232. "A procedurally inadequate determination to deny benefits to Indians in frustration of their legitimate expectation ... is inconsistent with the 'distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people'." 476 F. Supp. 1471, 1480 (citing *Morton* at 236, quoting *Seminole Nation v. United States*, 316 U.S. 286, 196 (1942)). Instead of providing opportunity for participation in a crucial decision regarding their health, the very agencies obligated to serve Indian children denied them that opportunity. The lower court decisions preserve the integrity of the rulemaking process.

Rulemaking is "agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations." *A Guide to Federal Agency Rulemaking*, *supra*, at 39-40. Agency action is legislative not only because of its future effect but because of its primary concern with policy considerations. *American Exp. Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973). Rulemaking involves the promulgation of concrete proposals, declaring applicable policies, binding on the public generally. *PBW Stock Exchange, Inc. v. Securities and Exchange Commission*, 485 F.2d 718 (3rd Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

All of the the hallmarks of rulemaking are present in the agency decision terminating the ICP. First, the action had *future effect*. It

completely eliminated services which the children had previously been eligible to receive. This was far more than a mere one-time allocation of monies. Second, the action had effect on a particular *group of persons*. It affected most immediately and particularly the 426 children who were actively receiving ICP services when the action was taken. Third, the action prescribed a *change in policy* regarding the organization of the ICP and services it provided. The ICP was specific in its organizational structure, location, funding, staffing, services, and eligibility for services. When the government announced its decision to terminate the clinical and support services it had for years provided to handicapped Indian children, it prescribed a major policy change which affected every aspect of the ICP.

When an agency changes an existing rule and that change has a substantial impact upon rights of the public, rulemaking is required. *National Retired Teacher's Ass'n v. U.S. Postal Service*, 430 F. Supp. 141, 148 (D.C.D.C. 1977), *aff'd*, 593 F.2d 1360 (D.C. Cir. 1979); *Brown Export, Inc. v. United States*, 607 F.2d 695 (5th Cir. 1979); *State of Alaska v. Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989). Changes which affect eligibility are particularly subject to rulemaking. *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478 (2d. Cir. 1972); *Vigil v. Andrus*, 667 F.2d 931 (10th Cir. 1982); *Lewis v. Weinberger*, 415 F. Supp. 652 (D.N.M. 1976). Here, the agencies established rules determining who was eligible for ICP services (R. 14, Plaintiffs' Memorandum in Support of Motion for Class Certification, Exhibit B).[2] These rules were applied by the agencies in their operation of the ICP, to referrals from sources in the community, and to parents seeking ICP services for their children. The announcement that the ICP would

2. The Indian Health Service Manual also sets out in great detail the duties the agency adopted for itself for its provision of health services to handicapped Indian children. *See, e.g.*, IHS Manual, Chapter 13 (7-1-85). App., *infra* at 10a - 16a. These rules are binding on the agency. *Morton v. Ruiz, supra*, at 235.

no longer provide clinical and support services to handicapped Indian children changed these eligibility rules and required rulemaking in order to be effective.

(b) The government relies on *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), for its position that the ICP termination action was not rulemaking. *Overton Park* held that an agency decision to expend federal funds to build a highway through a park was not rulemaking. *Overton Park* is distinguishable. The agency action here involved termination of an on-going program which provided services for many years to needy recipients with whom the United States has a special relationship, all pursuant to congressional mandate and agency rules governing eligibility and program services. These facts set this case apart from *Overton Park*.[3] This does not necessarily mean that every agency reallocation of money requires rulemaking. However, where the action terminates an entire program's services to individuals eligible for such services under the agency's own rules, APA procedural protections are required. *See, e.g., Morton v. Ruiz, supra; Vigil v. Andrus, supra*. Moreover, it would be a terrible irony if an agency's self-described reallocation decision entirely terminating services and eligibility for those services was somehow found not to be a rule when agency actions eliminating some individuals' eligibility but not terminating an entire program's services have been found to be a rule. *Morton v. Ruiz, supra*.

3. Reviewing courts have viewed changes in agency direction differently than initial courses of action. *See, e.g. Robbins v. Reagan*, 780 F.2d 37 (D.C. Cir. 1985) ("Once an agency has declared that a given course is the most effective way of implementing the statutory scheme, the courts are entitled to closely examine agency action that departs from this stated policy." *Id.* at 45, citing *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 40-44 (1983)); *Heckler v. Chaney, supra*, at 853 (Marshall, J, concurring in judgment)("the agency may well narrow its own . . . discretion through historical practices from which it should arguably not depart in the absence of explanation, or through regulations.").

(c) The government fails to offer any authority exemplifying or supporting its fear that the rulemaking process will have a negative effect on its operation of Indian programs. In any event, it is clear that the rulemaking provisions of 5 U.S.C. § 553 were designed to assure fairness and mature consideration of rules of general application. *N.L.R.B. v. Wyman-Gordan Co.*, 394 U.S. 759 (1969). In this case, the government had opportunity to demonstrate why injunctive relief reinstating the ICP should not be granted, but failed to make any showing of harm. As in their petition, they produced only what the district court described as a "string of unsupported premises and conclusions" yet "marshall[ed] neither facts nor well-grounded legal arguments in support of these feared effects." 476 F. Supp. at 1485, 1486. On the contrary, the children fear that giving the IHS and BIA carte blanche to conduct its Indian programs will deleteriously affect those whom the agencies are supposed to serve, as they demonstrated below. *Id.* at 1484.

Moreover, § 553(b)(3)(B) of the APA provides an exception whenever "the agency for good cause finds ... that notice and public procedures are impracticable, unnecessary, or contrary to the public interest." § 553 (d)(3) also allows an agency, upon finding good cause, to make a rule effective immediately, thereby avoiding the 30 day delayed effective date requirement of § 553. Thus, the court of appeals' decision will not cause any undue restriction on the government's operation of its Indian programs.

3(a). Judicial review of agency action is a right afforded by the APA which can only be denied when the agency shows " 'clear and convincing evidence' of legislative intent to restrict access to judicial review." *Citizens to Protect Overton Park v. Volpe, supra*, at 410; 5 U.S.C. § 702. There is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667, 670 (1986). An exception to judicial review exists "to the extent that" the action "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

However, it is a "very narrow" exception. *Overton Park, supra.* It applies only in those rare circumstances where "statutes are drawn in such broad terms that in a given case there is *no law* to apply." *Id.* (emphasis added). This "Court has limited the exception to judicial review provided by 5 U.S.C. § 701(a)(2) to cases involving national security . . . or those seeking review of refusal to pursue enforcement actions." *Franklin v. Massachusetts*, No. 91-1502, (June 26, 1992) (Stevens, J., Blackmun J., Kennedy, J., and Souter, J., concurring in judgment).

The court of appeals correctly found "law to apply" in a history of congressional funding for the ICP under the IHCIA, 25 U.S.C. § 1601 *et seq.*, and Snyder Act, 25 U.S.C. § 13; in the duty of fairness owed to the children under the special relationship which has developed between the United States and Indian people; and in the Snyder Act itself. The district court also found "law to apply" in the IHCIA and Education for All Handicapped Act, 20 U.S.C. § 1400 *et seq*. These sources, together with the IHS Manual and rules adopted regarding the ICP, provide ample "law to apply" for purposes of judicial review. These sources of law, expressed in both broad standards and detailed duties, cannot be minimized. Where such law exists, it cannot fairly be concluded that there is clear and convincing evidence that Congress intended to withhold judicial review. Where such law exists, it cannot fairly be concluded that no law applies so that judicial review is precluded.

(b) The decision of the court of appeals is consistent with the decisions of other circuits. Other circuits have found in both the IHCIA and federal Indian trust responsibility law "law to apply" to review agency actions regarding Indian health care. *McNabb for McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987) (IHS has primary responsibility for the maternity costs of indigent Indians); *White v. Califano*, 437 F. Supp. 543, *aff'd*, 581 F.2d 697 (8th Cir. 1978) (IHS, rather than the State of South Dakota, is responsible for Indian mental health care).

(c) The IHCIA was enacted so that the United States could fulfill

> its special responsibilities and legal obligations to the American Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with resources necessary to effect that policy.

25 U.S.C. § 1602.

§ 1601(a) provides that

> Federal health services to . . . Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American people.

This legislation makes clear that in its provision of health care to Indians, the government is bound by its special relationship with them. Although the government argues that it is only constrained by this "trust" responsibility when it deals with Indian property, Congress has made clear through §§ 1602 and 1601(a) that when the government provides Indians with health services, it does so as a direct result of this special relationship. In effect, Congress has admitted for the IHS that the "trust" responsibility applies to its provision of health care. Thus, the government cannot properly argue here that this special relationship provides no applicable law for review of its actions.

(d) The Snyder Act provides that the

> Bureau of Indian Affairs . . . shall direct, supervise, and expend such moneys as Congress may . . . appropriate, for the benefit, care and assistance of Indians . . . for relief of distress and conservation of health.

25 U.S.C. § 13.

This language mandates that congressional funding for Indian health be used to relieve their distress and conserve their health. BIA and IHS actions which do not accomplish this mandate are not in accord with the Snyder Act and can be judged contrary to it. Although broad, this standard is not devoid of any meaning so as to grant those agencies who receive funding under it complete and unfettered discretion as to how they use such funding. As stated by the district court, "[a] statutory command of this breadth confers broad discretion upon the agency to apply its particular expertise in determining how to achieve its mandated objective and in optimally allocating scarce resources to this end, but the breadth of the command does not imply discretion to act in a manner that ignores or disserves the objective." 746 F. Supp. 1471, 1478.

(e) Congressional appropriations history is also relevant and may be referred to "for guidance in determining the proper rules for providing Indian health assistance." *McNabb, supra*, at 793, note 6; *Morton v. Ruiz, supra*. In determining the propriety of a BIA termination of general assistance benefits to Indians living off, but near an Indian reservation, this court noted that

> [e]ven more important is the fact that, for many years, to and including the appropriations year at issue, the BIA itself made continual representations to the appropriations subcommittees that nonurban Indians living "near" a reservation were eligible for BIA services.

Id. at 214.

Thus, the district court did not err in finding "that the members of Congress took the IHS at its word in explaining its implementation of the IHCIA" when they appropriated funding for the ICP year after year. *McNabb, supra*, at 793, note 6.

(f) Finally, if any doubt remains, any uncertainty as to the construction of these laws must be resolved in favor of the children. Statutes enacted to benefit Indians must be liberally construed in their favor. *Ruiz v. Morton*, 462 F.2d 818 (9th Cir. 1972), *aff'd*, 415 U.S. 199 (1974); *Fox v. Morton*, 505 F.2d 254 (9th Cir. 1974); *Wilson v. Watt*, 703 F.2d 395 (9th Cir. 1983). Pursuant to this canon of construction, these laws must be interpreted in such a way as to favor, rather than restrict, judicial review under the APA. This is especially true here where the children have stated claims that these laws were violated by the very agencies obligated to serve them. "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith." *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,

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APPENDIX A — SECTION 552 (a) (1) OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 552 (A) (1)

§552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedures, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice

of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

APPENDIX B — SECTION 702 OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 702

§702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

APPENDIX C — SECTION 706 OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Appendix C

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX D — SECTION 1601 OF THE INDIAN HEALTH CARE IMPROVEMENT ACT, 5 U.S.C. § 1601

§ 1601. Congressional findings

The Congress finds that—

(a) Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people.

(b) A major national goal of the United States is to provide the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level and to encourage the maximum participation of Indians in the planning and management of those services.

(c) Federal health services to Indians have resulted in a reduction in the prevalence and incidence of preventable illnesses among, and unnecessary and premature deaths of, Indians.

(d) Despite such services, the unmet health needs of the American Indian people are severe and the health status of the Indian is far below that of the general population of the United States. For example, for Indians compared to all Americans in 1971, the tuberculosis death rate was over four and one-half times greater, the influenza and pneumonia death rate over one and one-half times greater, and the infant death rate approximately 20 per centum greater.

(e) All other Federal services and programs in fulfillment of the Federal responsibility to Indians are jeopardized by the low health status of the American Indian people.

(f) Further improvement in Indian health is imperiled by—

(1) inadequate, outdated, inefficient, and undermanned facilities. For example, only twenty-four of fifty-one Indian Health Service Hospitals are accredited by the Joint Commission on Accreditation of Hospitals; only thirty-one meet national fire and safety codes; and fifty-two locations with Indian populations have been identified as requiring either new or replacement health centers and stations, or clinics remodeled tor improved or additional service;

(2) shortage of personnel; For example, about one-half of the Service hospitals, four-fifths of the Service hospital outpatient clinics, and one-half of the Service health clinics meet only 80 per centum of staffing standards for their respective services;

(3) insufficient services in such areas as laboratory, hospital inpatient and outpatient, eye care and mental health services, and services available through contracts with private physicians, clinics, and agencies. For example, about 90 per centum of the surgical operations needed for otitis media have not been performed, over 57 per centum of required dental services remain to be provided, and about 98 per centum of hearing aid requirements are unmet;

(4) related support factors. For example, over seven hundred housing units are needed for staff at

remote Service facilities;

(5) lack of access of Indians to health services due to remote residences, undeveloped or underdeveloped communication and transportation systems, and difficult, sometimes severe, climate conditions; and

(6) lack of safe water and sanitary waste disposal services. For example, over thirty-seven thousand four hundred existing and forty-eight thousand nine hundred and sixty planned replacement and renovated Indian housing units need new or upgraded water and sanitation facilities.

(g) The Indian people's growth of confidence in Federal Indian health services is revealed by their increasingly heavy use of such services. Progress toward the goal of better Indian health is dependent on this continued growth of confidence. Both such progress and such confidence are dependent on improved Federal Indian health services.

APPENDIX E — SECTION 1602 OF THE INDIAN HEALTH CARE IMPROVEMENT ACT, 5 U.S.C. § 1602

§ 1602. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligations to the American Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all resources necessary to effect that policy.

APPENDIX F — INDIAN HEALTH SERVICES MANUAL, CHAPTER 13, MATERNAL AND CHILD HEALTH (7-1-85) (EXCERPTS)

Chapter 13
MATERNAL AND CHILD HEALTH

3-13.1 INTRODUCTION

A. Purpose:

This chapter establishes the policies, objectives, procedures, responsibilities and guidelines relating to specific health care activities provided for children, youth and the family by the IHS.

B. Policy:

Comprehensive health services will be provided to children, youth and the family addressing preventive, therapeutic and rehabilitative aspects.

C. Objectives:

1) To promote health services of such quality and availability to children, youth and the family that American Indian and Alaska Native children and adults will have full opportunity to attain and maintain optimal physical and mental health.

2) To provide guidelines and standards as a basis of measurement, evaluation and improvement of services for children, youth and the family.

D. Procedures:

(1) This chapter is divided into program areas defining specific aspects of care.

(2) This chapter will be periodically reviewed and updated to reflect changes or improvements in standards of care.

E. Responsibilities:

(1) Headquarters - Maternal and Child Health (MCH) Program Coordinator, Senior Clinicians of OBGYN and Pediatrics, Chief Nurse-Midwifery Branch and Deputy Chief, Nursing Services Branch.

a. Will work with Area/Program MCH Chiefs in formulating, developing, and evaluating programs and recommendations for the improvement of health and medical care services to children, youth and the family.

b. Will provide liaison with and consultation to other IHS headquarters staff, tribal officials, and other Federal and non-Federal agencies regarding MCH programs and activities.

* * *

3-13.6 CARE OF THE INFANT AND CHILD

A. Purpose:

This section sets forth the IHS policies, objectives,

procedures, responsibilities, and guidelines for meeting specific health needs of infants and children.

B. Policies:

(1) As a component of the health care system of the IHS, health services to infants and children will be made available.

(2) These services should address the preventive, therapeutic and rehabilitative needs of infants and children.

(3) All facilities without a pediatrician on staff should have pediatric consultant site visits quarterly with the content of these visits documented for quality assurance purposes.

C. Objectives:

(1) To define required Area/Program and Service Unit responsibilities in order to provide this care.

(2) To provide for a system that will permit monitoring of compliance with this policy and evaluation of program performance.

D. Procedures:

Each Service Unit must have a written plan and protocol that addresses the following areas of service.

a. The Well Child.

b. The Sick Child.

c. The Handicapped Child.

E. Responsibilities:

(1) Service Unit MCH Program Coordinator will periodically review the program performance and update or change existing plans and protocols.

(2) Area MCH Chief will periodically evaluate the Service Unit's program and evaluate each Service Unit's conformity to the above policies.

F. Program Guidlines:

Service Unit plans & protocols should be developed using these guidelines, in conjunction with standards and guidelines established by the American Academy of Pediatrics and the state's Early and Periodic Screening, Diagnosis and Treatment Program (EPSDT).

* * *

(3) The Handicapped and Chronically Ill Child - services must be provided that will emphasize the importance of preventing handicapping conditions or preventing extension of existing conditions. Specific issues to be addressed:

Appendix F

(a) Early identification of defects: Since early recognition of children with abnormal development is essential to minimize handicaps and identify children not receiving adequate amounts of stimulation in the home, it is essential that every child be developmentally screened at least once by age one with some form of standardized screening instrument, such as the Denver Prescreening Developmental Questionnaire (PDQ) or the Denver Developmental Screening rest. This should then be repeated at least yearly.

Children with an abnormal test or. routine well child screening should receive a comprehensive evaluation and individual education plan from qualified professionals.

(b) Management: To insure adequate long-team treatment and coordination of services for children with handicaps, each Service Unit is to designate one person to serve as Handicapped Child Coordinator. This person will be expected to carry out the following activities:

(1) Maintain an up-to-date register of all children and young adults up to age 21 who have a chronic, handicapping, or potentially handicapping condition.

The registers are to assure continuity of care and communication between the various health care providers.

Appendix F

Four types of conditions are to be addressed:

(a) Children needing frequent medical visits (endocrine problems, seizures, etc.)

(b) Children with established disabilities (mental retardation, etc.)

(c) Children with conditions awaiting future surgery, (example - cleft palate)

(d) Children at risk for problems (prematures, post meningitis, post head injury)

(2) Review the progress of each person at least yearly and serve as or appoint a case manager for those children requiring frequent and continuing medical supervision.

(3) Maintain or have access to a regionalized directory of available services for handicapped children and their families.

Coordinate referral and follow-up, including linkages to other agencies such as State Crippled Children's Programs, Indian Children's Program, Special Education.

(4) Orient the medical staff annually to the existence of the program and the services available.

Appendix F

In addition, it is recommended that the coordinator participate in or organize a community coordinating body consisting at least of a representative from Head Start, the local school special education program, parents of handicapped children, and a representative from the regional developmental disability and special education programs. This group would help facilitate transitions from preschool to school and identify gaps and bottlenecks in existing services.

(c) Prevention: such as prenatal care, genetic counseling, and injury control which are discussed in other sections of the manual.

No. 91-1833

In the Supreme Court of the United States

OCTOBER TERM, 1992

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, ET AL., PETITIONERS

v.

GROVER VIGIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

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REPLY BRIEF FOR PETITIONERS

In our petition for a writ of certiorari, we demonstrate that the court of appeals has interpreted the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and congressional appropriations acts to impose on federal agencies substantial burdens that do not follow from the text of those statutes. Specifically, the court of appeals has elevated statements made in congressional committee reports to the level of an Act of Congress by holding that such statements provide "law to apply" sufficient to permit judicial review of an agency's allocation of lump-sum appropriations. Respondents do not deny that this ruling squarely conflicts with the District of Columbia Circuit's decision in *International Union* v. *Donovan*, 746 F.2d 855 (1984), cert. denied, 474 U.S. 825 (1985). In addition, the court of appeals has seriously misinterpreted the

rulemaking provisions of the APA by deeming an agency's discretionary resource-allocation decision to be a legislative "rule." Respondents' attempts to justify the court of appeals' reasoning and to downplay the significance of its decision are unpersuasive.

1. a. Respondents err in contending (Br. in Opp. 5-6) that the first question presented in our petition (Pet. i, 9-15)—the validity of the court of appeals' finding of "law to apply" for purposes of reviewing the decision of the Indian Health Service (IHS) to terminate the Indian Children's Project (ICP)—is not ripe for consideration by this Court because the courts below have not yet gone on to hold that the termination was arbitrary and capricious on the merits. The court of appeals' finding of "law to apply," if allowed to stand, would result in direct and tangible interference with the decisionmaking processes of the affected agencies, not only in further proceedings concerning the ICP, but in all aspects of the federal government's provision of services to Indians. Virtually all agency decisions with any potential impact on Indians would have to be carefully and exhaustively documented in anticipation of potential judicial review on the merits, despite the total absence of judicially manageable standards for conducting such review. The court's holding therefore imposes an immediate burden on the affected agencies, even before the courts below turn to the question whether petitioners' decision in this particular case was arbitrary or capricious.

b. Respondents also err in contending (Br. in Opp. 5-6) that certiorari should be denied because petitioners did not appeal from the district court's ruling that the termination of the ICP violated the publication requirements of 5 U.S.C. 552. In their opening brief on appeal, petitioners directly challenged the district court's ruling that the decision to terminate the ICP was a "legislative" or "substantive" rule. See Gov't C.A. Br. 27-36. That ruling, of course, constituted the sole basis for the district court's determination that petitioners had violated Section 552, which requires publication of "substantive rules of general

applicability." 5 U.S.C. 552(a)(1)(D); see Pet. App. 41a, 43a. Had the court of appeals agreed with petitioners that the termination decision was not a rule at all, it would have been required to reverse the district court's judgment, including the finding of a Section 552 violation. Since the district court's Section 552 ruling rests on the same erroneous premise that led both courts below to impose notice-and-comment procedures, Section 552 does not provide an independent ground for upholding the judgment below.

2. In defense of the decision below, respondents contend (Br. in Opp. 10-14) that the court of appeals properly ruled that statements made in congressional committee reports and hearings on lump-sum appropriations bills,[1] together with vague precatory statutory language and general notions of the federal "trust" responsibility for Indians, constitute "law to apply" for purposes of judicial review under the APA. Not content to rely on the purported sources of law cited by the courts below, however, respondents point as well to the "IHS Manual and rules adopted regarding the ICP" in their attempt to avoid the conclusion that the reallocation of funds was "committed to agency discretion by law." 5 U.S.C. 701(a)(2); see Br. in Opp. 11. This attempt to bolster the decision below is without foundation.

a. We are unaware of, and respondents fail to cite, any "rules * * * regarding the ICP" that would provide law for a court to apply. The IHS Manual provisions relied on by respondents (see Br. in Opp. App. 10a-16a) do not mandate or even mention the ICP, nor do they provide standards for a court to apply in reviewing the agency's decision to terminate that pilot project. The applicable regulation

[1] Respondents misleadingly refer in their "Questions Presented" (Br. in Opp. i) to a "congressional mandate" to conduct the ICP. As the record demonstrates, the ICP was created at the discretion of the IHS, not at the command of Congress. Pet. 9-10; Pet. App. 11a. The "congressional mandate" to which respondents refer consists of nothing more than congressional hearing testimony and committee reports accompanying lump-sum appropriations for the IHS. *Id.* at 13a.

describing the IHS Manual, 42 C.F.R. 36.3 (1986), explains that it consists only of "operating procedures to assist officers and employees in carrying out their responsibilities." The regulation further explains that those procedures "are not regulations establishing program requirements which are binding upon members of the general public." *Ibid.*[2] Significantly—despite respondents' urging—neither court below held that the IHS Manual provisions provided "law to apply."

b. Respondents assert that congressional appropriations history may be referred to "for guidance in determining the proper rules for providing Indian health assistance." Br. in Opp. 13 (quoting *McNabb* v. *Bowen*, 829 F.2d 787, 793 n.6 (9th Cir. 1987)). Contrary to respondents' contentions, however, neither *McNabb* v. *Bowen* nor *Morton* v. *Ruiz*, 415 U.S. 199 (1974), holds that the legislative history of a lump-sum appropriations bill furnishes a basis for a court to review an agency's allocation of that lump sum among various programs. Moreover, respondents do not dispute that the court of appeals' reliance on legislative history of lump-sum appropriations for that purpose is in direct conflict with the decision of the District of Columbia Circuit in *International Union* v. *Donovan*, 746 F.2d 855, 861 (1984) (Scalia, J.), cert. denied, 474 U.S. 825 (1985). Indeed, respondents do not even cite *International Union*. That circuit conflict, however, warrants resolution by this Court.

c. Respondents also err in asserting (Br. in Opp. 11-12) that the Tenth Circuit's view of the federal trust responsibility is consistent with decisions of other circuits. As we explained in our petition (Pet. 11), the government acts as a fiduciary when it deals with Indian *property*. *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987). The trust responsibility, however,

[2] Thus, this case plainly differs from *Morton* v. *Ruiz*, 415 U.S. 199, 234-235 (1974), in which this Court held that certain provisions of the Bureau of Indian Affairs' internal manual were intended to serve as binding regulations.

"do[es] not create property rights where none would otherwise exist." *Ibid.* Here, respondents cannot claim any property right in the ICP; Snyder Act funds are gratuitous appropriations, not trust funds belonging to the Indians. *Scholder* v. *United States*, 428 F.2d 1123, 1129 (9th Cir.), cert. denied, 400 U.S. 942 (1970).

The "trust" cases cited by the respondents (Br. in Opp. 11) are inapposite. The issue in both *McNabb* v. *Bowen*, *supra*, and *White* v. *Califano*, 581 F.2d 697 (8th Cir. 1978), was whether responsibility for providing health care to an indigent individual rested with the IHS or state health authorities. In both cases the courts held that it was the IHS's duty to provide health care to the individuals involved, based on the courts' determination that Congress intended the IHS to bear the primary responsibility for providing health care to indigent Indians. *White*, 581 F.2d at 698; *McNabb*, 829 F.2d at 793. Neither case holds that the federal "trust" responsibility imposes independent, judicially enforceable obligations on the federal government beyond those imposed by Congress itself.

Here, nothing in the Indian Health Care Improvements Act (IHCIA), 25 U.S.C. 1601 *et seq.*, or the Snyder Act, 25 U.S.C. 13, provides any basis for judicial scrutiny of the IHS's decision to terminate the ICP. Respondents rely (Br. in Opp. 12) on the "Congressional Findings" and "declaration of policy" that preface the substantive portions of the IHCIA, 25 U.S.C. 1601, 1602, contending that "Congress has admitted for the IHS that the 'trust' responsibility applies to the provision of health care." Respondents do not attempt to explain, however, how any "trust" obligation derived from those provisions could be applied by a court in a meaningful manner. The provisions cited by the respondents do not mandate spending on certain programs or contain specific spending requirements. Nor do they make any mention of benefits to be provided to handicapped Indian children in the Southwest; indeed, those provisions do not mention Indian children at all. Plainly, this "general statement of 'findings' * * * is too thin a reed to support * * * rights and

obligations read into it." *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 19 (1981).[5]

Likewise, the Snyder Act is without meaningful standards by which to judge BIA or IHS actions. "The general language of the Snyder Act does not delineate eligibility criteria or distribution guidelines for Indian health programs." *McNabb* v. *Bowen*, 829 F.2d at 790. Respondents assert (Br. in Opp. 12-13) that the Snyder Act provides law to apply because agency expenditures that were not undertaken for the relief of distress and conservation of Indian health would be unlawful, but they do not explain how the IHS action at issue here could be reviewed under that standard. The IHS terminated the ICP in order to utilize agency resources in a manner that would benefit Indian children nationwide rather than in the Southwest alone. That action was clearly intended to conserve Indian health.

In an effort to overcome the generality of the statutory text, respondents assert (Br. in Opp. 14) that the "laws must be interpreted in such a way as to favor, rather than restrict, judicial review under the APA," because "[s]tatutes enacted to benefit Indians must be liberally construed in their favor." That canon of construction provides for a broad construction in determining whether Indian rights have been reserved or established, and a

[5]. Rather than providing "trust" law to apply, the provisions of the IHCIA quoted by the respondents illustrate a point we made in our petition. Pet. 13 n.7. In providing annual appropriations under the IHCIA and the Snyder Act and vesting broad discretion in the IHS and BIA to expend those appropriations for the benefit of Indians, Congress satisfied the moral obligations it found to be incumbent upon the federal government by virtue of the special relationship between the United States and Indian tribes. Since Congress declined to create vested rights in the particular programs or services provided under the auspices of the IHCIA and the Snyder Act — or to specify particular standards that must be followed by the IHS and BIA in allocating funds—the "special relationship" possesses no independent legal force in this context. It thus provides no basis for judicial review of discretionary agency decisions concerning the allocation of appropriated funds.

narrow construction when Indian rights are to be abrogated or limited. F. Cohen, *Cohen's Handbook of Federal Indian Law* 224-225 (1982). In the instant case, however, Indian rights are not at issue, and permitting judicial review is not necessarily favorable to Indians. In fact, the construction respondents urge would delay the provision of medical services to communities in need, because any change in services would likely result in a "hometown" challenge to the agency's decision. Thus, instead of benefiting Indian communities, respondents' position would lead to litigation among those communities over the allocation of finite IHS and BIA resources. In such cases, the canon of construction cited by respondents is of no assistance. Cf. *Hoopa Valley Tribe* v. *Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986) (holding that there is no federal trust responsibility that can be discharged to the benefit of some Indians but at the expense of others).

3. a. Respondents contend (Br. in Opp. 7-10) that the courts below correctly held that the IHS's decision to terminate the ICP constituted a "rule" subject to the procedural requirements of the APA. In their view, all of the hallmarks of rulemaking are present in the decision terminating the ICP, because that decision had future effect on a particular group of persons and constituted a change in agency policy.

Respondents' arguments misapprehend the nature of rules and rulemaking. To be sure, the decision to terminate the ICP had a future effect, but that fact is hardly surprising, because "obviously *all* agency statements have future effect" in a sense. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 217 (1988) (Scalia, J., concurring). What respondents ignore is that the IHS decision lacks the most significant attribute of a rule: It does not state for the future "what the law will be." *Id.* at 221. Specifically, the decision does not purport to set out future standards applicable either to the agency or to private parties.

Respondents mischaracterize the agency decision in contending (Br. in Opp. 8-9) that the IHS's termination of

the ICP changed "eligibility rules." Contrary to respondents' assertions (*id.* at 8), the IHS did not "establish[] rules determining who was eligible for ICP services." Rather, the ICP was a "regional * * * evaluation, treatment planning, consultation and training program" that would treat any "IHS * * * eligible child." App., *infra*, 1a (reproducing R. 14, Plaintiffs' Memorandum in Support of Motion for Class Certification, Exhibit B). The IHS decision to terminate the ICP did not change any individual's eligibility for IHS services or alter the general eligibility requirements published by the IHS. See 42 C.F.R. 36.12 (1986). Rather, it merely reallocated resources within the IHS. A change in services is not equivalent to a change in eligibility.[4]

b. In our petition (at 18) we demonstrated that under *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), agency decisions concerning the discretionary allocation of funds for the provision of services are not subject to the APA's procedural requirements that govern promulgation of legislative rules. Respondents contend (Br. in Opp. 9) that the instant case is different because it involves Indians "with whom the United States has a special relationship" and because the ICP was established pursuant to "congressional mandate and agency rules governing eligibility and program services." The record plainly shows, however, that the ICP was not created pursuant to congressional mandate, but was instead a discretionary pilot program established by IHS under a lump-sum appropriations act that made no mention of the ICP. Pet. App. 11a. Moreover, the creation and termination of the program did not affect any individual's eligibility for IHS services. And the "special relationship" between Indians and the federal government does not provide any independent basis for imposing rulemaking requirements, because it is not an independent source of

[4] Indeed, IHS regulations make plain that the services available to Indian communities will vary from time to time and place to place in the discretion of the IHS. See 42 C.F.R. 36.11(c) (1986).

specific legal constraints on the federal government in the absence of vested Indian property rights or entitlements. See Pet. 11-12, 20. Thus, respondents' attempts to distinguish *Overton Park*'s APA ruling are unavailing.

It is also clear that none of the other statutes relied on by respondents imposes notice-and-comment or publication procedures on petitioners under the circumstances of this case. As this Court made clear in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978), courts may not burden agencies with administrative procedures that are not required by statute. Accordingly, the notice-and-comment requirement imposed by the court of appeals conflicts with *Vermont Yankee*, and warrants this Court's review.[5]

[5] Respondents speculate (Br. in Opp. 10) that imposition of rulemaking procedures on IHS health-care allocation decisions and other federal Indian programs "will not cause any undue restriction on the government's operation of * * * [such] programs" because the government has available to it the "good cause" exception to APA notice-and-comment rulemaking. See 5 U.S.C. 553(b)(3)(B). That argument is flawed, for several reasons. First, agency resource allocation decisions are not rules at all, and thus neither the APA's rulemaking requirements nor the exceptions thereto are applicable. Second, the "good cause" exception is applied narrowly, see *Action on Smoking and Health* v. *CAB*, 713 F.2d 795, 800 (D.C. Cir. 1983), and were the IHS permitted to apply this exception to all of its health-care delivery and allocation decisions, the exception would quickly swallow the rule. Finally, it is not necessarily the case that application of this exception would save either time or expense in making allocation decisions, because the exception envisions that the agency will treat its decision as a rule for other administrative purposes. Such treatment, no less than the actual notice-and-comment period, will burden and delay services provided by the IHS and similar agencies.

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

AUGUST 1992

APPENDIX

The Indian Children's Program (ICP) is a jointly funded activity of the Office of Mental Health Programs of the Indian Health Service (OMHP/IHS) and the Office of Indian Educational Programs of the Bureau of Indian Affairs (OIEP/BIA). The ICP is predominantly a regional (BIA-IHS Albuquerque and Navajo Areas plus the Hopi Reservation) evaluation, treatment planning, consultation and training program but does carry out some national educational activities. This brochure is designed to help people in the regional referral area understand the functioning of the ICP, make appropriate referrals and know where to turn if problems with the Program arise.

I. *Who is eligible for services?*

The ICP will see any IHS or BIA/OIEP eligible child from birth through 21 years who either has, is suspected of having, or is at risk for having a physical, mental, emotional handicap or combination of handicaps. *Handicap* is defined as an inability to function in a normal fashion. Severity of handicap is not a consideration for eligibility. The majority of diagnostic categories seen by the Program are learning disabled, emotionally disturbed, mentally retarded, cerebral palsied, communications disordered, and the multiply-handicapped.

Under specific circumstances older individuals may be seen. Decisions to do such evaluations are made at the discretion of the ICP Director and are clearly the exception rather than the rule.

Any organization involved with Indian children, partially or totally, is eligible to receive education and training program services from ICP.

II. *What is the ICP service philosophy?*

The first priority of the ICP is the long-term treatment planning and follow-up of individual clients. It is more important to make certain that a treatment program is monitored periodically in a reliable fashion than it is to respond quickly to a new referral. Most of the children seen by ICP have chronic problems which require long-term involvement. In those rare instances when a true emergency exists, the Program will try to respond in a timely manner.

The ICP is meant to supplement existing local resources, not compete with them. ICP staff is available in a consultative capacity to local resources, either for second opinions or collaboration in difficult or confusing cases.

(3)

No. 91-1833

In the Supreme Court of the United States

OCTOBER TERM, 1992

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, ET AL., PETITIONERS

v.

GROVER VIGIL, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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JOINT APPENDIX

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Counsel for respondents

PETITION FOR A WRIT OF CERTIORARI FILED: MAY 14, 1992
CERTIORARI GRANTED: OCTOBER 5, 1992

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[1] The opinions of the court of appeals and the opinions of the district court are printed in the appendix to the petition for a writ of certiorari and have not been reproduced here.

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 86-1182-JB

GROVER VIGIL, ET AL.

v.

EVERETT R. RHOADES, M.D., ET AL.

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
9/26/86	1	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
12/29/86	11	ANSWER by defts., USA
5/22/87	27	ORDER cause be maintained as class action, class consists of all handicapped Indian children who in past received, or who presently are or have been or will be eligible to receive health services from IHS in Albuquerque Area, Navajo Area, Navajo Area and Hopi reservation portion of Phoenix area, including health services formerly available through the Indian Children's program.
12/29/87	67	DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT
12/30/87	68	PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

DATE	NR	PROCEEDINGS
7/6/90	104	MEMORANDUM OPINION AND ORDER that defts' M/to Dismiss for Lack of Jurisdiction and in the Alternative for Sum Judg is denied; pltfs' M/for Partial Summary Judgment is granted in part; parties w/in 15 days of this Memorandum shall submit supplemental briefs addressed solely to the question whether an injunction should issue compelling reinstatement of the Indian Children's Program as it existed and functioned immediately prior to its termination in 1985.
8/28/90	113	MEMO OPINION AND ORDER re: Supplemental Memoranda filed by parties pursuant to Court's 7-6-90 Memo and Opinion
10/26/90	114	NOTICE OF APPEAL by defts., from the Court's Memorandum opinions & Orders entered on 8/28/90 & 7/6/90.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-2235

GROVER VIGIL, ET AL.

v.

EVERETT R. RHOADES, M.D., ET AL.

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
11/6/90	1	Civil Case Docketed.
1/15/92	31	Terminated on the Merits after Oral Hearing; Judgment is Affirmed; Written, Signed, Published. Seymour, panel member; Barrett, panel member; Baldock, authoring judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV 86-1182 JB

GROVER VIGIL and CHARLENE VIGIL as General Guardians and Next Friends for ASHLEY VIGIL, a minor person,

—and—

KEE SANDOVAL and JUDY SANDOVAL as General Guardians and Next Friends for KRISTOFFERSON SANDOVAL, a minor person,

—and—

ANGELA C. ALLEN, as General Guardian and Next Friend for ANGELO ALLEN, a minor person, individually and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

EVERETT R. RHOADES, M.D., Director of the Indian Health Service, his agents, employees, and successors; OTIS R. BOWEN, Secretary of the Department of Health and Human Services, his agents, employees, and successors; THE DEPARTMENT OF HEALTH AND HUMAN SERVICES; DONALD O. HODEL, Secretary of the Department of the Interior, his agents, employees, and successors; ROSS SWIMMER, Assistant Secretary of the Interior-Indian Affairs, Bureau of Indian Affairs United States Department of the Interior, his agents, employees, and successors; THE DEPARTMENT OF THE INTERIOR; and the UNITED STATES OF AMERICA, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

[Filed Sep. 26, 1986]

1. This is a class action for declaratory and injunctive relief designed to ensure access to and provision of health and medical services for which plaintiffs are eligible and which defendants are obligated to provide. Plaintiffs seek to have this court declare unlawful and enjoin certain policies and practices, and actions and inactions of defendants, in regard to their provision of health and medical services to handicapped Indian children in the Southwest. Plaintiffs challenge the termination of health and medical services through the Indian Children's Program and defendants' resulting failure to ensure provision of these services to these children.

Plaintiffs seek a declaratory judgment that defendants' actions in terminating health and medical services through the Indian Children's Program and its policies and practices, and actions and inactions in regard to provision of these services to these children are variously in violation of defendants' federal trust responsibility to plaintiffs, the Administrative Procedure Act, plaintiffs' due process rights under the Fifth Amendment to the United States Constitution, the Indian Health Care Improvement Act, the Snyder Act, various rules and regulations promulgated by defendants which govern Indian health care, and are arbitrary and capricious, an abuse of discretion, and contrary to law.

In addition and in the alternative, plaintiffs seek a mandatory or injunctive decree compelling defendants to: (1) provide access to essential diagnostic, evaluation, treatment planning, and therapy services to plaintiffs; (2) develope, implement, and maintain a system at each service unit in the Albuquerque Area, Navajo Area, and Phoenix Area of the Indian Health Service to identify handicapped Indian children and to ensure that they receive such ongoing health and medical care which will

enable them to attain and maintain optimal physical, mental, and emotional health; (3) develop and implement a national level policy with respect to their obligation to provide health and medical services to handicapped Indian children; (4) withdraw their decision to terminate direct clinical care health and medical services through the Indian Children's Program to plaintiffs and to restore the Program's services to them; (5) notify the children receiving Indian Children's Program Services at the time of its termination of health and medical services available to them as handicapped individuals through the Indian Health Service, and of administrative grievance procedures available to them if such services are denied; and (6) promulgate, publish, and obtain public comments on any rule or decision-making which reduces or eliminates direct clinical care health and medical services through the Indian Children's Program to handicapped Indian children.

II. JURISDICTION

2. Jurisdiction is conferred upon this court by 28 U.S.C. § 1331 and 28 U.S.C. § 1337 in that plaintiffs' claims arise under the Constitution and laws of the United States; and by 28 U.S.C. § 1361 in that this is an action to compel an officer or agency of the federal government to perform duties owed to plaintiffs.

3. Judicial review of agency action is authorized by 5 U.S.C. § 702.

4. Declaratory relief sought by plaintiffs is authorized by 28 U.S.C. §§ 2201 and 2202.

5. Venue is proper in the District of New Mexico under 28 U.S.C. § 1391.

III. PLAINTIFFS

6. Plaintiffs' Grover Vigil and Charlene Vigil are a married couple residing in the County of Sandoval, State of New Mexico. They are parents of Ashley A. Vigil, a

minor child who resides with them. Grover Vigil is a member of the Jicarilla Tribe.

7. Plaintiff Angela C. Allen is a resident of the County of San Juan, State of New Mexico. She is the mother of Angelo Allen, a minor child who resides with her. Angela Allen and Angelo Allen are members of the Navajo Tribe.

8. Plaintiffs' Kee Sandoval and Judy Sandoval are a married couple residing in the County of San Juan, State of New Mexico. They are parents of Kristofferson Sandoval, a minor child who resides with them. Kee Sandoval, Judy Sandoval, and Kristofferson Sandoval are members of the Navajo Tribe.

IV. CLASS ACTION

9. Plaintiffs bring this action individually and as class representatives on behalf of all other persons similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs represent a class of all handicapped Indian children who in the past received, or who presently are, have been, or will be eligible to receive health services from Indian Health Service in the Albuquerque Area, and Phoenix Area, including health services formerly available through the Indian Children's Program.

10. The class is so numerous that joinder af all members is impracticable. Although the exact number is unknown, based on information and belief, there are over 2000 handicapped Indian children who have been served by the Indian Children's Program. The exact number of such children should be known by defendants and should be able to be readily obtained from them through discovery. The total number of children eligible for Program services is unknown but is believed to be substantially larger number than those actually served by the Program. On or about October 1, 1985, the Program terminated services to approximately 216 handicapped Indian children alone.

11. There are questions of law or facts common to the class. Defendants have terminated direct clinical care

services through the Indian Children's Program to all members of the class, have failed to notify them of this termination or afford them any due process in connection with their termination of services, and have generally failed to ensure that they are provided with the necessary health and medical services to which they are entitled.

12. Plaintiffs' claims are typical of the class in seeking declaratory and injunctive relief for violations of defendants' federal trust responsibility to provide adequate health care, the Administrative Procedure Act, plaintiffs' due process rights under the Fifth Amendment to the U.S. Constitution, the Indian Health Care Improvement Act, the Snyder Act, various rules and regulations promulgated by defendants which govern Indian health care, and on the basis that defendants' acted arbitrarily and capriciously, abused their discretion, and acted contrary to law.

13. Plaintiffs will fairly and adequately represent and protect the interests of the class.

14. Defendants have acted and failed or refused to act on grounds generally applicable to the class, thereby making appropriate preliminary and final injunctive relief and declaratory relief with respect to the class as a whole.

V. DEFENDANTS

15. Defendant Everett R. Rhodes, M.D., is the Director of the Indian Health Service, a special branch of the Public Health Service, in the Department of Health and Human Services, and has overall responsibility for management and supervision of the Indian Health Service.

16. Defendant Otis R. Bowen is the Secretary of the Department of Health and Human Services and has overall responsibility for management and supervision of Department, including the Indian Health Service.

17. Defendant United States Department of Health and Human Services is an agency of the federal government of the United States of America which administers programs and supervises matters relating to health in the United States, including the Indian Health Service and Indian health.

18. Defendant Donald O. Hodel is Secretary of the Department of the Interior and has overall management and supervision of the Department, including the Bureau of Indian Affairs.

19. Defendant Ross Swimmer is the Assistant Secretary of the Interior Department-Indian Affairs, Bureau of Indian Affairs and has overall management and supervision of the Bureau of Indian Affairs, including the Office of Indian Educational Programs.

20. Defendant United States Department of the Interior is an agency of the federal government of the United States of America which includes the Bureau of Indian Affairs and which administers programs and supervises matters relating to Indians in the United States, including the Office of Indian Educational Programs of the Bureau of Indian Affairs.

VI. STATEMENT OF FACTS

21. Ashley Vigil is a three year old child born on January 28, 1983. She has been diagnosed as having cerebral palsy and was born with congenital heart disease. At six months she began receiving health and medical services through the Indian Children's Program. She was evaluated by a team of specialists and received physical therapy on a monthly basis until June, 1985. After that time, no one from the Indian Children's Program saw her and she received no further services through the Program. She was not notified of termination of the Program or of its services to her. She was not referred elsewhere for treatment, nor informed by the Indian Health Service or Indian Children's Program as to what medical or health services she would continue to need or where she might obtain them.

22. Kristofferson Sandoval is a five year old child born on June 16, 1981, at the Gallup Indian Medical Center in Gallup, New Mexico. Following his birth, he was regularly taken to his well baby clinics. However, by the time he was two and a half years old, his mother felt he was not developing normally and reported her feelings to Indian Health Service personnel at three or four well baby clinics. However, no suggestions were made as to how she might verify if he had any special problems; no referrals were made, and no action was taken by the Indian Health Service to evaluate for any developmental disability.

In 1984, during a hospitalization, Kris was noted by hospital personnel to be very different from other children his age and difficult to handle. Again, however, the Indian Health Service failed to refer him for any evaluation or treatment or take any action itself to determine any disability.

After herself learning about the Indian Children's Program, Judy Sandoval was able to obtain services from the Indian Children's Program. ICP clinicans saw Kristofferson on an almost monthly basis until approximately April, 1985. After that time he received no further services through the Program. He was not notified of the termination of the Program or of its services to him.

Since termination of the Indian Children's Program services, Kristofferson has not received any direct care treatment from the Indian Health Service on an on-going basis. Despite specific referrals to the Indian Health-Service, Kristofferson has received only a fifteen minute examination by a psychiatrist at the Gallup Indian Medical Center in Gallup and a drug prescription.

23. Angelo Allen is a five year old child born on April 8, 1981. Six months after his birth during his six months check up at the Indian Health Services hospital in Shiprock, New Mexico, it was determined that Angelo was mentally retarded. He subsequently at age three began receiving Indian Children's Program services which continued until the summer of 1985. Prior to cessation of ICP services, his clinician verbally informed Angela that ICP might be discontinued. However, she never received any formal or written notification of termination of services nor was she informed where she might obtain substitute and alternative services or referred to them. Since termination of ICP services, Angelo has not received any direct care treatment or monitoring. One referral was made by Indian Health Services to a private hospital in Farmington for an E.K.G.

24. The Indian Children's Program was an activity of the Office of Mental Health Programs of the Indian Health Service which was co-sponsored by the Office of Indian Educational Programs of the Bureau of Indian Affairs.

25. The Indian Children's Program was a predominantly regional program which provided evaluation, diagnostic, treatment planning, therapy, and consultation services to Indian children in the Albuquerque Area, Navajo Area, and portions of the Phoenix Area (primarily the Hopi Reservation) of the Indian Health Service.

26. Children from birth through twenty one years of age who had, were suspected of having, or were at risk of having a physical, mental, emotional handicap or combination of handicaps who were eligible for services from the Indian Health Service or Office of Educational Programs of the Bureau of Indian Affairs were eligible for Indian Children's Program services. Severity of handicap was not a consideration for eligibility.

27. The majority of diagnostic categories seen by the Indian Children's Program were learning disabled, emotionally disturbed, mentally retarded, cerebral palsied, communication disordered, and the multiply handicapped.

28. Direct clinical care services were often provided to children in their homes in remote areas without ready access to any medical facilities.

29. The Indian Children's Program was a successful demonstration of highly skilled clinical teams delivery of essential diagnostic, evaluation, treatment planning, therapy, and consultation services to handicapped Indian children in remote Indian communities.

30. Sometime during the summer of 1985, an Indian Health Service decision was made at the national level to eliminate the Indian Health Service clinical component of the Indian Children's Program.

31. As of October 1, 1985, provision of direct Indian Children's Program health and medical services to handicapped Indian children was discontinued.

32. Approximately 216 cases were closed out beginning October 1, 1985.

33. During the fall of 1985, the Indian Children's Program held a series of community meetings to present closing patient information on cases of children in the Shiprock, Crownpoint, Zuni, and Gallup areas of New Mexico who had undergone treatment by the Indian Children's Program staff.

34. The Shiprock meeting on November 13, 1985, determined that there was a lack of sufficient resources to meet the needs of Indian children in the areas of motor evaluation/therapy and psychological evaluation/treatment from all available sources, including the Indian Health Service.

35. The Shiprock meeting determined that there was a lack of full evaluation and ongoing treatment services to Indian children ages birth to five.

36. The Crownpoint meeting on November 20, 1985, determined that there was a lack of sufficient resources to meet the needs of Indian children in the area of motor evaluation/therapy, speech/language evaluation/therapy, cognitive/developmental evaluation, and preschool placement, from all available sources, including the Indian Health Services.

37. The Crownpoint meeting determined that there was a lack of evaluation and ongoing treatment services to Indian children ages birth to five.

38. The Zuni meeting on November 21, 1985, determined that there was a lack of psychological services, particularly in the identification and/or treatment/educational planning for behavior disordered children, occupational therapy, and physical therapy.

39. The Zuni meeting determined that the needs, services, and treatment plans for handicapped Zuni children needed to be monitored and coordinated on an on-going basis.

40. The Gallup meeting on January 14, 1986, determined that there was a lack of sufficient resources to meet the needs of Indian children in the areas of motor evaluation/therapy, cognitive/development evaluation, preschool placement, and psychological evaluation/therapy from all available sources, including the Indian Health Service.

41. The children who had been receiving Indian Children's Program services were not themselves notified of the decision to terminate direct services to them nor were they notified of or provided with any administrative or other grievance procedures.

42. The children who had been receiving Indian Children's Program services were not referred to other service providers for necessary services.

43. Subsequent to the termination of Indian Children's Program services, the Indian Health Service failed to provide necessary services to children who had been receiving them or to children who were eligible for them to fill the gap left by termination of Indian Children's Program services.

44. Most of the children served by the Indian Children's Program are not aware of any alternative health services which might have been available to them or how to go about obtaining such services, but are dependent

upon the Indian Health Service for provision of their health and medical care.

45. Early detection and intervention services for handicapped Indian children are crucial; without early detection and intervention, many pre-school age children will be further handicapped by the time they reach mandated school programs for the handicapped.

46. As a result of the termination of Indian Children's Program services, handicapped Indian children who were served by the Program and who would have been eligible to receive its services have been irreparably harmed and will continue to be irreparably harmed until the Indian Health Service again makes these services available.

47. At no time have defendants promulgated, published, or obtained comment on any rule implementing their decision to terminate Indian Children's Program direct clinical services as required by the Administrative Procedure Act, 5 U.S.C. §§ 552 and 553 and *Morton v. Ruiz*, 415 U.S. 199 (1974).

48. At no time have defendants provided children served by the Indian Children's Program with any due process connected with their termination of their services as required by the Fifth Amendment to the U.S. Constitution.

49. Plaintiffs have a legitimate claim of entitlement to continued Indian Children's Program direct clinical services sufficient to constitute a protected property interest under the Fifth Amendment to the U.S. Constitution absent notice and opportunity to be heard prior to termination of these services.

VII. FIRST CLAIM FOR RELIEF

50. Plaintiffs restate and incorporate by this reference the fore-going paragraphs herein.

51. Insofar as defendants' have failed to promulgate, publish, or obtain public comment on any rule implementing their decision to terminate Indian Children's Program

services to handicapped Indian children, they have violated the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 552 and 553 and *Morton v. Ruiz*, 415 U.S. 199 (1974).

VIII. SECOND CLAIM FOR RELIEF

52. Plaintiffs restate and incorporate by this reference the fore-going paragraphs herein.

53. Insofar as plaintiffs participated in essential Indian Children's Program services which defendants provided and for which they were eligible, insofar as defendants have failed or refused to notify plaintiffs of their decision to terminate their services, and insofar as defendants have failed or refused to provide plaintiffs with administrative grievance procedures, they have, by their summary termination of the Program, violated plaintiffs right to procedural due process under the Fifth Amendment to the U.S. Constitution.

54. Plaintiffs have a legitimate claim of entitlement to continued Indian Children's Program direct clinical services sufficient to constitute a protected property interest under the Fifth Amendment to the U.S. Constitution absent notice and opportunity to be heard prior to termination of these services.

IX. THIRD CLAIM FOR RELIEF

55. Plaintiffs restate and incorporate by this reference the foregoing paragraphs herein.

56. By terminating services it had been providing to handicapped Indian children through the Indian Children's Program and by its actions and inactions in failing to ensure access to and provision of essential diagnostic, evaluation, treatment planning, and therapy services to plaintiffs, defendants have violated the provisions of the Snyder Act, 25 U.S.C. § 13, requiring them to direct, supervise, and expend such monies as Congress may appropriate for

the relief of distress and conservation of health of Indians in the United States.

X. FOURTH CLAIM FOR RELIEF

57. Plaintiffs restate and incorporate by this reference the foregoing paragraphs herein.

58. By terminating services it had been providing to handicapped Indian children through the Indian Children's Program and by its actions and inactions in failing to ensure access to and provision of essential diagnostic, evaluation, treatment planning, and therapy services to plaintiffs, defendants have violated the policy set out in the Indian Health Care Improvement Act, 25 U.S.C. § 1601 et seq. requiring federal health services to maintain and improve the health of Indians.

XI. FIFTH CLAIM FOR RELIEF

59. Plaintiffs restate and incorporate by this reference the foregoing paragraphs herein.

60. By terminating services it had been providing to handicapped Indian children through the Indian Children's Program, defendants:

(a) failed to follow their own rules and regulations as set out in the Indian Health Services Manual Part 3, Chapter 3; and

(b) failed to follow their own regulations set out at 12 C.F.R. § 36.1 et seq. regarding services available and persons to whom services will be provided.

61. By their actions, defendants have acted arbitrarily and capriciously, have abused their discretion, and have acted contrary to law, whereby plaintiffs have suffered injury. Plaintiffs therefore have a claim for relief under the Administrative Procedure Act, 5 U.S.C. §§ 702, 706.

XII. SIXTH CLAIM FOR RELIEF

62. Plaintiffs restate and incorporate by this reference the foregoing paragraphs herein.

63. By their actions and inactions as set out above herein defendants have violated their federal trust responsibility to provide essential diagnostic, evaluation, treatment planning, and therapy services to plaintiffs.

XIII. EQUITY

64. Plaintiffs are clearly entitled to relief on the merits of this case and are threatened with severe, irreparable injury unless mandatory preliminary injunctive relief is granted. Defendants will suffer no injury if such relief is granted because it is little more than their duty under law and any burden placed on defendants is outweighed by the injury to plaintiffs. Such relief would not be adverse to but in the public interest.

XIV. PRAYER FOR RELIEF

65. Plaintiffs pray that this court certify this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure at its earliest opportunity.

66. Plaintiffs pray that this court issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 that defendants' actions in terminating direct clinical care health and medical services to handicapped Indian children through the Indian Children's Program are in violation of defendants's federal trust responsibility to plaintiffs, the Administrative Procedure Act, plaintiffs' due process rights under the Fifth Amendment to the United States Constitution, the Snyder Act, the Indian Health Care Improvement Act, various rules and regulations promulgated by defendants which govern Indian health care and are arbitrary and capricious, an abuse of discretion, and contrary to law.

67. Plaintiffs pray that this Court grant preliminary and permanent injunctive relief ordering defendants to: (1) provide access to essential diagnostic, evaluation, treatment planning, and therapy services to plaintiffs, and (2) withdraw their decision to terminate direct clinical care health and medical services through the Indian Children's Program to plaintiffs and restore the Program's services to them.

68. Plaintiffs pray that this Court grant mandamus relief pursuant to 28 U.S.C. § 1361 compelling defendants to: (1) develop, implement, and maintain a system at each service unit in the Albuquerque Area, Navajo Area, and Phoenix Area of the Indian Health Service to identify handicapped Indian children and to ensure that they receive such ongoing health and medical care which will enable them to attain and maintain optimal physical, mental, and emotional health; (2) develop and implement a national level policy with respect to their obligation to provide health and medical services to handicapped Indian children; (3) notify the children receiving Indian Children's Program services at the time of its termination of health and medical services available to them as handicapped individuals through the Indian Health Service, and of administrative grievance procedures available to them if such services are denied; and (4) promulgate, publish, and obtain public comments on any rule or decision-making which reduces or eliminates direct clinical care health and medical services through the Indian Children's Program to handicapped Indian children.

69. Pray that this court award them their reasonable costs and attorney's fees.

70. Pray that this court grant them such further and additional relief as may be just and proper.

Respectfully submitted,

By /s/ Joel Jasperse
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(Verification Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted in Printing)

ANSWER

[Filed Dec. 29, 1986]

Comes now the United States of America, by and through its attorneys, William L. Lutz, United States Attorney for the District of New Mexico, and Raymond Hamilton and Ronald F. Ross, Assistant United States Attorneys for said District, and states as follows:

1. Plaintiffs' allegations in paragraph 1 of the complaint are characterizations of plaintiffs' suit and therefore do not need a response, but to the degree that a response is deemed necessary, those allegations are denied.

2. Defendant denies the allegations contained in paragraphs 2, 3, 4, 5, 9, 10, 11, 12, 13, 14 and 44 of plaintiffs' complaint.

3. Defendant admits the allegations contained in paragraphs 6, 7, 8. 16, 17, 18, 19, 20, 24, 26, 27 and 45 of plaintiff's complaint.

4. Defendant admits the allegations contained in paragraph 15 except that defendant's surname is spelled Rhoades.

5. Defendant is without sufficient information to form a belief as to the allegations in paragraphs 21, 22 and 23 of plaintiffs' complaint and therefore denies same.

6. Defendant denies the allegations contained in paragraph 25 of plaintiff's complaint except to admit that the Indian Children's Program (ICP), on a referral basis,

performed diagnostic examinations, developed long term treatment plans, and monitored treatment programs, as consultants to local IHS Service Unit personnel who had the responsibility to provide or arrange for ongoing treatment within the constraints of IHS and other available resources. In some cases, ICP staff and contractors did provide limited direct clinical services, such as physical therapy, during diagnostic examinations and periodic visits to monitor long term treatment programs carried out by local practitioners. The ICP provided these services to Indian children in the IHS Albuquerque and Navajo Areas, and in portions of the IHS Phoenix Area (primarily the Hopi reservation).

7. Defendant denies the allegations contained in paragraph 28 of plaintiffs' complaint except to admit that while the services described in answer to No. 25 above were occasionally provided to children in their homes, the services were usually provided in a clinic environment.

8. Defendant denies the allegations contained in paragraph 29 of plaintiffs' complaint except to admit that the ICP provided the services described in answer No. 25 above to handicapped Indian children in remote Indian communities with limited success.

9. Defendant denies the allegations contained in paragraph 30 of plaintiffs' complaint except to admit that the IHS decided at the national level in October, 1984 to phase out services from ICP described in answer to No. 25 above. Defendants aver that program management technical assistance (technical assistance and training to help IHS staff and others in local communities work as a team to establish their own programs to care for ~~han~~dicapped Indian children, accessing both IHS and non-IHS resources) is a continuing responsibility of the ICP.

10. Defendant denies the allegations contained in paragraph 31 of plaintiffs' complaint except to admit that the services from ICP described in answer to No. 25 above ceased as of October 1, 1985.

11. Defendant denies the allegations contained in paragraph 32 of plaintiffs' complaint except to admit that the services from ICP described in answer to No. 25 above ceased in approximately 426 cases.

12. Defendant denies the allegations contained in paragraph 33 of plaintiffs' complaint except to admit that the ICP held a series of community meetings in the Shiprock, Crownpoint, Zuni and Gallup areas in the last quarter of fiscal year 1985 to discuss continuing case management for the approximately 426 children referred to in answer to No. 32 above.

13. Defendant denies the allegations contained in paragraphs 34, 35, 36, 37, 38, 39, and 40 of plaintiffs' complaint except to admit that the community meetings discussed ongoing case management and availability of IHS and non-IHS resources.

14. Defendant is without sufficient information to form a belief as to the allegations in paragraph 41 of plaintiffs' complaint and therefore denies same. Defendants aver that the ICP did not have primary responsibility within the IHS for providing "direct services" to handicapped Indian children, nor did the IHS "terminate direct services" to handicapped Indian children when ICP services described in answer to No. 25 above ceased. There is no obligation to provide administrative grievance procedures.

15. Defendant denies the allegations contained in paragraph 42 of plaintiffs' complaint. Defendants aver that local practitioners were provided with information on alternative resources.

16. Defendant denies the allegations contained in paragraph 43 of plaintiffs' complaint. Defendants aver that to the extent resources permit, services for children with handicapping and chronic conditions have and continue to be provided by each IHS service unit and by available resources such as other Federal programs, and State and local programs.

17. Plaintiffs' allegations in paragraphs 46 through 64 of the complaint are conclusions of law and therefore do not need a response, but to the degree that a response is deemed necessary, those allegations are denied.

18. Plaintiffs' allegations in paragraphs 64 through 70 constitute plaintiffs' prayer for relief which requires no response, but to the degree that a response is deemed necessary, defendant requests that plaintiffs' prayer be denied.

All allegations of the complaint not specifically admitted herein are denied.

First Defense

The court lacks subject matter jurisdiction over the instant suit.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

The Court lacks jurisdiction over the instant suit in that any and all actions by Federal defendants, of which plaintiffs complain, are committed to agency discretion by law and, therefore, are not reviewable under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2).

All 12(b) defenses raised herein shall be supplemented by motions and briefs pursuant to Rule 9(d) *United States District Court Rule.*

Respectfully submitted,

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United States Attorney

/s/ Raymond Hamilton
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(Certificate Omitted in Printing)

HEALTH SERVICES ADMINISTRATION
INDIAN HEALTH SERVICE

DATE: January 31, 1978

TO: All Area Directors
Indian Health Service
Attn: P.L. 94-437 Coordinator

FROM: Director,
Indian Health Service

SUBJECT: Mental Health Diagnostic and Treatment Center—The Indian Childrens' Center

Congressional authorization and appropriations, under PL 94-437 (Title II), have mandated that a childrens' residential diagnostic and treatment center be established within the Mental Health Programs of I.H.S. This action came directly from many expressions of a strong traditional Native American and Alaska Native interest in caring for unfortunate children. The National Indian Health Board recently reaffirmed this concern with a forceful resolution supporting "The Indian Childrens' Village" as an IHS wide service facility.

Preliminary progress in developing this project has moved rapidly under the immediate direction of Dr. Theodore C. Marrs, Albuquerque Chief, Maternal and Child Health, and a developmental team in the Albuquerque Area Office. This group has worked closely with the Headquarters Mental Health Programs, Dr. H. C. Townsley, Chief. A few highlights of this process include unanimous Laguna Pueblo Governor and Council endorsement for construction of facilities on Tribal land, support from the Albuquerque City Council and Chamber of Commerce, major interest by the University of New Mexico School of Medi-

cine Departments of Psychiatry and Pediatrics, etc. Funding for FY 78 activities and authorization for eleven positions have been provided to Mental Health Programs, headquarters office. The program of requirements (P.O.R.), staffing and budget breakouts, and initial engineering and architectural plans are underway. A preliminary progress report, containing additional details, is being sent to all of you through Dr. Townsley's office. I suggest you duplicate my memorandum and this preliminary report and send it to all service unit directors, appropriate branch chiefs, and Tribal health boards since this project is of such imminent and wide interest.

The Indian Childrens' Village is of special timeliness since PL 94-142 has ordered free educational opportunities for handicapped children and a multidisciplinary diagnostic and therapeutic model is essential to carrying out this mandate. It is also a unique opportunity for BIA and IHS cooperation, a role which has already been started by provision of IHS data in support of BIA needs under PL 94-142 and their oral commitment to us of their intent to fund essential educationally related and other support positions with the Village.

In addition to the foregoing, this project provides a model, in the best sense of Indian Self Determination, through its use of a twenty year lease with private sector construction funding. The potential significance of this administrative point is clear to each of you.

The decision has been made that the first executive director of this program should be a board certified pediatrician with broad background in Mental Health and Administrative matters. We hope this decision will help in building an image for the Village of the concern for the *total* child.

Dr. Ted Marrs, on a part time basis, has been and will continue to serve as acting Executive Director until formal

advertising and selection has been made. He has an extensive professional and administrative background and is well prepared to continue in this Acting capacity.

Finally, it is with special pleasure that I recognize and thank Acting Director, Dr. Jack Ellis, and Area Director Mr. Jay Harwood of the Albuquerque Area for their sustained interest and devotion to this project. They have been personally cooperative and have allowed Area staff to spend considerable time in developing this program to date. We will continue to be appreciative of their help.

I call upon each Area Directors to strongly support this project as a much needed and requested national resource. Your continued support and the success of this first project may well open doors to the establishment of other such facilities at various locations.

/s/ Emery A. Johnson, M.D.
EMERY A. JOHNSON, M.D.
Assistant Surgeon General

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
HEALTH SERVICES ADMINISTRATION

Indian Children's Program
Indian Health Service
2401 12th Street, N.W.
Albuquerque, New Mexico 87102

February 8, 1980

MEMORANDUM

TO: Assistant Secretary for Indian Affairs
Dept. of the Interior

FROM: Acting Director, Indian Children's Program
Co-Director, Indian Child Study Project
(Bureau of Indian Affairs)

SUBJECT: Indian Child Study Project—Bureau of Indian Affairs/Indian Health Service

In 1978 action was initiated by the Indian Health Service, with the support of several Indian tribes, to obtain an appropriation of funds from the U.S. Congress to construct a diagnostic and treatment planning facility for Indian children near Albuquerque, New Mexico. Because of an unsupportive position taken by the Bureau of Indian Affairs before the House Appropriations Committee, the project was not funded. Subsequent to the House Appropriations Committee hearings, representatives of the Bureau of Indian Affairs and the Indian Health Service met with Congressman Sidney Yates, at which time the representatives were instructed to devlop a cooperative effort to determine whether or not the Bureau of Indian Affairs and the Indian Health Service could operate a joint program designed to provide diagnostic, treatment planning, and treatment services for handicapped chil-

dren. Further, to develop a position on the need of a multidisciplinary medical/education complex to provide these services.

Following several meetings between representatives of the Indian Health Service and the Bureau of Indian Affairs, the joint Bureau of Indian Affairs/Indian Health Service cooperative project, now known as the Indian Child Study Project, was developed and was commenced in June 1979 with a letter of commitment to Congressman Yates from Deputy Assistant Secretary for Indian Affairs, Mr. Rick Lavis, a copy of which is attached. In August 1979, Ms. Ann Crawley was officially appointed as Co-Director of the Child Study Project for the Bureau of Indian Affairs (see attachment) and has been serving in such capacity on a part-time basis. The following constitutes a report of the first 90 days operation of the Project as committed in the letter of June 28, 1979, to Congressman Yates.

The Bureau of Indian Affairs on September 13, 1979, allocated $350,000 of year-end money, which was transferred to the Albuquerque Area Office of the Bureau of Indian Affairs. Considering the nature of funds and the time constraints for actual obligation of the funds, it was determined through mutual agreement of the Project Director and Co-Director that the funds could be best utilized to the greatest benefit as follows:

1. The Bureau of Indian Affairs would, through the means of contracts, support and supplement the existing Indian Health Service—Indian Children's Program with:

   a. Additional staff to supplement and complement the Indian Children's Program multidisciplinary outreach team with the following positions:

      Educational Diagnosticians
      Speech Therapist

Vocational Rehabilitation Specialist
Social Worker
Child Psychologist
Expressive Arts Therapist
Administrative and Clerical Personnel.

b. Funds for administrative support services.

c. Funds for defraying costs related to transportation and lodging of patient children, and their parents or escorts, brought to Albuquerque, New Mexico, for diagnosis and evaluation through the University of New Mexico School of Medicine.

d. Funds for initiation of the SOMPA Project, a project designed to determine the possibility and practicability of establishing culturally oriented testing norms.

e. Funds for the determination of available resources or lack thereof and the development of a resources handbook.

The Indian Health Service—Indian Children's Program, likewise, received an allotment of year-end funds which were obligated via contracts, as follows:

1. A contract was entered into with the University of New Mexico School of Medicine to provide diagnostic, evaluative, treatment planning, and limited treatment services for handicapped children referred by the Indian Children's Program on either an inpatient or outpatient basis. These services are intended to be utilized where such servives are not available locally or cannot be provided by the staff of the Indian Children's Program or other local resources.

2. In addition, the Indian Children's Program would make available to the Study Project its regular program staff consisting of the following disciplines:

   Clinical Psychologist
   Social Worker

Occupational Therapist
Physical Therapist
Speech Therapist
Child Psychiatrist

During the initial phase of this project, both agencies, the Indian Health Service and the Bureau of Indian Affairs, at the local level, worked on specifics for the program and developed plans for subsequent fiscal years. The Project directorship is presently analyzing the current activities; identifying problems, solutions or alternatives; identifying the types of services needed or being requested and developing ways to meet them; developing policies and procedures; and determining future program direction. As opportunities occur, changes and modifications are being implemented. The Project directorship is also involved in the following specific actions:

1. Reviewing and redesigning the organizational structure of the Indian Children's Program to reflect a joint Indian Health Service-Bureau of Indian Affairs activity (a copy of the proposed organizational chart and functional statements is attached.).

2. Developing and implementing necessary administrative and clinical processes and procedures governing the operations of the outreach team and staff (see attachment).

3. Delineating specific agency responsibilities.

The increase in staff has resulted in a porportionate increase in the Indian Children's Program's capability to provide services. Attached is a detailed report of the specific services rendered during the reporting period and a cumulative report of services provided during the Fiscal Year 1979. The report provides information as to the number and types of services provided, the findings and the recommendations for follow-up care.

Conclusions which can be drawn from report are as follows:

1. There exists a tremendous unmet need for diagnostic, evaluative, treatment planning and treatment services for handicapped Indian children.
2. There exists serious shortage or lack of available local resources to meet such needs.
3. The multidisciplinary team approach is a viable means of partially meeting such needs.
4. Methods and means of providing services where local resources are totally non-existent or severly limited, and where the handicapping conditions of children are so severe or that the services of the outreach team would be inadequate, must be developed and implemented.
5. The multidisciplinary outreach team approach can be a workable and practical approach to a cooperative effort of providing such services to handicapped Indian children, thus permitting both agencies of a means of partially meeting the legal mandates of P.L. 94-142 and P.L. 94-437.
6. The current level of permanent funding and program staffing is grossly inadequate to meet existing needs.
7. A program of direct treatment services must be implemented.
8. Through the concept for the treatment and care of handicapped children in the "mainstream" is well-founded and with much merit, it is a fact that such cannot be accomplished at many locations because of the lack of available local resources such as health care facilities and personnel.

In addition to the diagnostic and treatment planning services provided by the multidisciplinary outreach team,

supplemental diagnostic, evaluative, treatment planning, and limited treatment services were also provided by the University of New Mexico School of Medicine. A report of the services provided is attached. In excess of forty cases were referred to the School of Medicine during the reporting period. Though the services provided were of high quality and served to supplement and to a degree complement the services provided by the Project staff, it is our opinion that such an arrangement is not a practical or satisfactory alternative to providing the needed services. Some of the disadvantages of such an arrangement are as follows:

1. The overall costs including charges for professional services provided, administrative costs, transportaiton, housing, and other related costs, make this arrangement a very expensive one.
2. Acceptance of referrals and scheduling of admissions is within the total discretion of the School of Medicine. This affects the Project's ability to provide timely services and scheduling for it's patients.
3. Patients and their parents or escorts are transported to Albuquerque via commercial means of transportation and are lodged in local motels. Meals and local transportation also provided. There is demonstrated uneasiness on the part of the patients and parents in coming to a large city and being in a large medical setting. The lodging, meals, and transportation arrangements are not conducive to the proper care or accommodation of a handicapped child.
4. There is a lack of cultural awareness or orientation on the part of the service providers, a quality considered to be essential in the proper diagnosis of and treatment planning for an Indian child. The lack of knowledge of available local resources necessitates close involvement on the part of the Project staff in the development and implementation of treatment plans.

5. The lack of internal cooperation among the Departments of the University limits the services available to the Project under the contract. Services from other Departments must be acquired by separate contracts resulting in increased costs to the Project.

The Project has not been totally without problems. The following is a partial list of some of the problems or situations which have had a direct affect upon our ability to implement the project on a timely basis and to maintain its operation in the least restrictive environment:

1. Contracting requirements, policies and processes vary substantially between the two agencies. It is the recommendation of the Project directorship that all contracting be accomplished through the Bureau of Indan Affairs and that necessary arrangements be undertaken to include those contracts utilizing Indian Health Service funds allotted to the Indian Children's Program.

2. The Indian Health Service has refused to issue Government's driver's licenses to personnel employed under contract which the Indian Children's Program has with non-federal organizations, who provide supplementary services to the Project and work side-by-side with regular Indian Children's Program staff. Arrangements have been made with the Bureau of Indian Affairs to issue such licenses to all personnel in accordance with their policies and standards.

3. The space facilities originally allocated to the Indian Children's Program are totally inadequate to house the increased staff. A Request for Space (SF-81) for additional space was initiated in June 1979, and submitted through Indian Health Service channels. To date, there has been no response to the requested action. Staff is presently housed in severely overcrowded quarters.

4. The imposition of travel restrictions and mandatory mileage reduction has forced a curtailment of some field activities. No immediate solution is foreseeable, however, efforts at resolution will continue.

5. There is at present a difference in the service population of the Bureau of Indian Affairs-Indian Health Service. The Bureau of Indian Affairs has not clarified its exact service population and/or responsibilities for implementing P.L. 94-142. However, by combining what the Bureau of Indian Affairs presently feels is their jurisdiction and accommodating those who fall outside of that area within the jurisdiction of the Indian Health Service, we have been able to provide services to almost everyone who is referred. Those who cannot be served are being referred to other agencies.

6. A substantial portion of the funds being used for current operations are non-recurring funds which were made available at year-end leaving little, if any, flexibility to adapt to actual program needs or for inclusion as a resource in planning or developing future program plans and operations. The allocation of recurring funds (year-by-year funding) is essential if the program is to be maintained at a level which can be responsive to meeting needs, priorities, and commitments. Project directorship will, however, continue to seek and utilize supplemental sources of funding.

7. The personnel recruitment and appointment process has not been responsive to filling positions on a timely basis. Much of the problem has been due to a shortage or lack of qualified applicants for professional positions. The lack of a permanent position ceiling prevents us from offering the security of permanency of employment and has seriously affected our recruitment efforts.

8. The extent of the Bureau of Indian Affairs' (Project Co-Director) involvement in the Project has been on an interim or part-time basis. There is a demonstrated need for full-time involvement. The proposed revised organizational structure of the Indian Children's Program and the requested financial participation of the Bureau of Indian Affairs (See attached proposed budget), if approved, will facilitate such involvement.

9. The lack of demonstrated interest and response in the utilization of Indian Children's Program services by Bureau of Indian Affairs, and some Indian Health Service, field activities has been the cause of some concern. It is probable that this has resulted in the unnecessary duplication of effort and expenditure of funds. Considering the intent of this pilot project and the data or information sought, it would appear that Bureau of Indian Affairs and Indian Health Service offices and programs should be mandated to utilize the services provided through the pilot project.

10. There is currently within both agencies a lack of adequately defined service jurisdiction among closely related program activities. This has caused the problem of territoriality and accusations of infringement upon other servicing jurisdictions. It is possible that this problem could be eliminated through the process of reassessment and restatement of related program responsibilities and jurisdictions.

11. There has been a lack of consistent involvement from the Central Office staff of both agencies, and a continuous shift in people. As new individuals become involved, the direction, expectations, and requests change. Finalization and approval of a memorandum of agreement along with expected data requirements and issues to be addressed will solve this.

One of the purposes of this pilot project, as previously stated, is to enable the Bureau of Indian Affairs and the Indian Health Service to assess the need for a multidisciplinary medical/education complex to provide services to handicapped Indian children. It is our concensus that the experiences and findings to date warrant the continued development and design of a facility. There is an unmet need existent within the Indian communities which must be met if there is to be compliance of legal mandates and accomplishment of the inherent responsibilities and moral obligations which the Bureau of Indian Affairs and the Indian Health Service have to the Indian people. We feel that the information and data to be developed during the remaining period of the pilot project wili enable us to make a specific recommendation regarding a facility.

The past period of the pilot project has demonstrated that it is not only possible but that it is practical, feasible, and more economical for the Bureau of Indian Affairs and Indian Health Service to have a joint or shared relationship where there is commonality or related service responsibility. We, therefore, recommend that the Bureau of Indian Affairs and the Indian Health Service continue to operate a joint program designed to provide a combined medical-education diagnosis, evaluative, treatment planning, and treatment services for handicapped Indian children. Further, we strongly encourage both agencies to allocate adequate funding and personnel resources to permit the operation of a meaningful and successful program.

Acting Director Indian Children's Program	Co-Director Indian Children's Study Project

Attachments

JOINT BIA/IHS INDIAN CHILD STUDY PROJECT MEMORANDUM AGREEMENT

Under the agreement reached with Congressman Sidney R. Yates, Chairman, House Interior Appropriations Subcommittee, the Bureau of Indian Affairs and the Indian Health Service were to develop a cooperative pilot program to determine whether or not BIA/IHS should operate a joint program designed to provide a diagnostic, treatment planning, and treatment service for handicapped Indian children.

This pilot project would be designed and operated to permit an evaluation of BIA/IHS capacity for institutional cooperation on assisting BIA through a combined medical-education diagnosis, treatment planning, and treatment program for assessing educational needs of handicapped Indian children. This pilot project would enable both BIA and IHS to assess the need for a multidisciplinary medical/education complex to provide services to handicapped Indian children. Further, this pilot project is designed to expand outreach services currently provided by the IHS-Indian Children's Program (ICP).

This pilot project, to be known as the Indian Child Study Project, will be established in Albuquerque, New Mexico, and be operated under the following conditions.

1. The Indian Child Study Project will be a joint venture of BIA and IHS with co-equal emphasis given to the health as well as the educational welfare of the child and parents.
2. Medical and educational diagnostic and treatment planning services will be provided by the Project through existing local services under contract or through direct services provided or arranged by IHS or BIA as appropriate, consistent with the concept of services to handicapped children in the least restrictive environment.

3. Indian children suspected of having medically and/or educationally handicapping conditions affecting development are to be referred to the Project for a comprehensive inter-disciplinary evaluation and child study either locally by the ICP Outreach Team or by the UNM School of Medicine, if conditions warrant. Referring sources could be parents, BIA schools, social service units, and local IHS units.
4. The geographic region to be utilized in this pilot project would be the Albuquerque, Navajo, and Phoenix areas. Referrals from outside this immediate region would be subject to availability of space, time and program capacity.
5. Diagnostic facilities will be provided by the BIA and/or IHS as appropriate under the conditions.
6. Transportation and housing for the child and parents will be provided through Project.
7. Results of the examination with recommendations will be discussed with the child's parents, school, and teacher and implemented in accordance with prescribed treatment plans or as may be modified by mutual agreement of concerned parties to coincide with the availability of local resources or lack thereof.
8. A report will be sent to appropriate local BIA and IHS resources for implementation and follow-up.
9. BIA-Office of Indian Education Programs and IHS will each designate a representative to assume joint responsibility for operating the project as co-directors. Each will be given full and complete program and administrative authorities necessary to carry out such responsibility. Both directors shall report to the Office of Indian Education Programs and the Director, Indian Health Services.

10. Both BIA and/or IHS will cooperate to provide contracting, fiscal, and personnel support services when and wherever necessary as expeditiously as possible.

11. The staff of the Indian Child Study Project will prepare a report covering the first 90 days of operation of the Project. It is mutually agreed that the start of the Project shall be November 1, 1979. This report is to cover the number of children reviewed, the results of the medical/educational diagnosis, and the follow-up recommendations. The report should also address the development of the Project, the relationship between IHS/BIA, and the projected prospects for institutional cooperation and its implications for the BIA handicapped program.

12. A more complete and detailed report is to be submitted by November 1, 1980, covering the same issue[s] as in the required 90 days report. In addition, this report is to include a final recommendation as to the need for establishing a BIA/IHS medical/educational complex to serve handicapped Indian children either in one geograhical setting or at a number of centers located throughout the BIA/IHS jurisdictional service area or not at all. In addition, recommendations in respect to the need for continuing a joint Outreach Program to provide diagnostic service, treatment planning, treatment, consultation, technical assistance and training will be provided.

13. Costs: Costs for the pilot project are to be funded by both the BIA and IHS as previously determined. The results of the pilot project shall not preclude the IHS-ICP from continuing its program of services for mentally and emotionally disturbed and handicapped Indian children.

14. The period of this pilot project shall be for one year, November 1, 1979, to November 1, 1980.

Signed:

/s/ [Illegible]
Deputy Assistant Secretary
Indian Affairs
U. S. Department of the Interior

2/21/80
Date

/s/ [Illegible]
Administrator
Health Services Administration
U. S. Department of Health,
Education and Welfare

2/20/80
Date

INDIAN CHILDREN'S PROGRAM

Office of Mental Health Programs
Indian Children's Program
March 14, 1980

Indian Children's Program

In 1976, the Congress of the United States enacted PL 94-437, the Indian Health Care Improvement Act. The Act declared that it is the policy of the United States, in the fulfillment of its special responsibilities and legal obligations to the American Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all resources necessary to effect that policy.

Title II, Section 201, Sub-section c, of this Act authorizes appropriations for the development of children's residential, diagnostic and treatment center(s) within the Mental Health Programs of the Indian Health Service. The Indian Children's Program is a response to this critical area of need and Congressional mandate. This Program is an integral part of the Mental Health Programs of the Indian Health Service and has the overall responsibility for coordination of effort in developing, providing and evaluating mental health services for children.

In carrying out this responsibility, one long neglected or overlooked area of specific service need was identified early in the development of the program as a result of another piece of legislation, PL 94-142, commonly referred to as the "Education of the Handicapped Act." Three of the problem categories identified in this Act, mental retardation, severely learning disabled, and severely emotionally disturbed, clearly require attention from the Program. The Indian Children's Program, however takes the position, advocated by the Joint Commission on the Mental Health of Children, that in child advocacy, one cannot separate mental health from physical health and has identified services to handicapped Indian children as a major focus of their effort.

It is estimated that there are in excess of 35,000 Indian persons under 21 years of age who have some form of handicapping condition. While not all these conditions

require the services of the Indian Children's Program, it is estimated that in the three categories noted above there are in excess of 12,000 Indian children under age 18 with problems of sufficient severity to require specialty diagnostic and treatment services.

In response to meeting this area of need and in complying with the Congressional mandate of both Acts, the Indian Children's Program responsibilities are focused on the provision of diagnostic, evaluative and treatment planning services to handicapped Indian children as a prerequisite to the proper treatment and care of these children.

Prior to the inception of the Indian Children's Program, services to handicapped children were provided on a "hit or miss" and "as can" basis by the staff of local Indian Health Service units, and in limited instances, tribal health care organizations. Ability to provide services to handicapped children was further affected by inattention to the need for such services or assignment of low priority by community or civic leaders, and in many instances, a cultural concept by Indian parents that the birth of a handicapped child was a form of punishment upon a parent or set of parents for past wrongs committed, and that such punishment had to be endured.

During the developmental period September 1978 through September 1979, with a full-time staff consisting of a Clinical Psychologist, a Physical Therapist, a Social Worker, and the part-time services of a Speech Therapist, an Expressive Arts Therapist, an Educational Diagnostician, and an Occupational Therapist, the following services were provided:

Diagnostic Evaluations/Assessments	422
Case Revews and Client Consultations	192
Program Assistance (Multidisciplinary and Mental Health)	153
Training (Sessions)	83

During this period these services were provided to a limited number of programs located on the Navajo Reservation and the Pueblos of Zuni, Laguna, Acoma, Jemez, and Santo Domingo.

The diagnostic evaluations and assessments were performed for children who had been referred from a variety of sources such as schools, clinics, parents, etc. The types of evaluations were psychological, psychoeducational, speech, occupational therapy, physical therapy, medical, psychiatric, and vocational rehabilitation depending on the needs of the referred child. Each case was then staffed and reviewed in the community by local health care providers who would be involved in the child's follow-up care. The parents and/or guardian were also involved.

Treatment planning included input from the family and local care providers. If specific treatment was required and was not available locally, someone in the family or the community was trained to provide the treatment when feasible. Periodic follow-up consultation was available from the ICP staff.

The case reviews conducted were of cases involving children with special problems. The reviews were made by a multidisciplinary team consisting of a Social Worker, Psychologist, Occupational Therapist, Physical Therapist, Arts Therapist, Speech Therapist, and an Educational Diagnostician. The cases were reviewed collectively to identify the child's specific problem areas and to provide recommendation to meet their special service needs.

The program assistance provided included assistance in proposal writing, development of new programs, extension of base programs, and development of community based resources to meet the special unmet needs of children within the community. Specifically, these efforts resulted in the development of first offender programs, alternative schools, and similar programs.

The training provided included instruction on the techniques and skills used in the care of handicapped children and included such topics as feeding techniques with developmentally disabled children and art techniques with handicapped children. The recipients of these instructions included local IHS personnel, special education personnel, tribal CHR's and other local health care providers.

The treatment provided was limited by staff size and availability of local resources. Treatment services are provided to the child and/or family and included individual child evaluations, therapy, individual and group counselling, and any services which entailed one to one interaction with the child, family, or staff member involved with the child.

Indian Child Study Project:

PL 94-142 mandates the evaluation of a child on a holistic basis, necessitating a multidisciplined diagnosis and thereby creating an environment for a conjoint effort between the Bureau of Indian Affairs and the Indian Health Service.

In the Fall of 1979, the IHS-Indian Children's Program, at the encouragement of Congressman Sidney Yates, was joined by the Bureau of Indian Affairs in a cooperative Project. The cooperative Project was to be designed to accomplish the following:

1. Determine whether or not the Bureau of Indian Affairs and the Indian Health Service could operate a joint program designed to provide diagnostic, treatment planning, and treatment services for handicapped Indian children, and

2. Develop a position on the need of a multidisciplinary medical/education facility to provide these services.

In addition to appointing a part-time Co-Director of the Project, the Bureau of Indian Affairs allocated $350,000

of year-end funds toward implementing the concept which was subsequently articulated in a formal interagency agreement, a copy of which is attached. The funds provided by the BIA served to supplement the existing Indian Children's Program by facilitating the employment of additional personnel including Educational Diagnosticians, Speech Therapists, a Developmental Psychologist, a Vocational Rehabilitation Therapist, a Recreational Therapist, a Physical Therapist, and an Occupational Therapist. With the additional staff the services of the Indian Children's Program were expanded by: (1) increasing the number of evaluations and consultations which could be conducted; (2) increasing the number of training sessions and special clinics which could be conducted; (3) permitting a wider range of representation of disciplines on the outreach staff; and (4) by increasing follow-up capability.

NIMH—Most-In-Need Program (MIN):

The Indian Children's Program has also been assisted in its efforts by the National Institute of Mental Health (NIMH) by making funds available through the Most-In-Need Prorgram (MIN). These funds have been earmarked for use in the employment of a Developmental Pediatrician, Clinical Psychologist, and a Social Worker. The personnel hired under the MIN program work directly with the multidisciplinary outreach teams.

BCMC-UNM:

Since the outreach team does not have a full complement of specialized disciplines represented on the team, and due to lack of appropriate facilities, at many locations it has been necessary to acquire some diagnostic and treatment services from other resources. A contract between the IHS-Indian Children's Program and the University of New Mexico School of Medicine was entered into. The

School of Medicine provides supplemental diagnostic, evaluative, treatment planning, and limited treatment services.

Indian children, accompanied by their parents or an escort, are brought to Albuquerque, housed in a local motel, and diagnosed or treated on either an inpatient or outpatient basis by the UNM School of Medicine. The outreach staff of the Indian Children's Program is involved in the staffing of each case, the development of a treatment plan, and the implementation and follow-up of the plan. This arrangement has served to make more specialized and a wider range of diagnostic services available to the Indian Children's Program. With the current staff and funding limitiations, it was decided to limit the primary catchment area to two states encompassing four IHS Areas, Albuquerque, Navajo, Phoenix and Tucson.

During the 90 day period November 1, 1979 to February 1, 1980, Indian Children's Program staff had on site contact with over 100 separate Tribal programs serving 20 Tribes. Table II, Appendix, lists these programs and tribes. Services provided to these programs during this period were categorized in the following fashion:

Diagnostic Evaluations/Assessments	197
Case Reviews and Client Consultations	252
Program Assistance (multidisciplinary and Mental Health)	17
Training (Sessions)	29 (for 696 people)

Diagnostic evaluations/assessments and case reviews/client consultations were provided for 246 patients. A breakdown by primary problem and age group of these 246 patients is included as Table I of the appendix. After appropriate evaluations, it was determined that 36 of the 246 patients seen during this period did not require further action.

The remaining 210 have continued to receive services from the program. 43 had problems of sufficient complexity to require more detailed workups at UNM. To date 14 of these have been further evaluated and appropriate follow-up initiated.

At the end of this 90 day period there was a backlog of 204 evaluations and assessments and 24 case reviews scheduled. During the month of February 122 of the evaluations and assessments were completed and all 24 of the case reviews were carried out.

Extrapolating the 90 day workload, by categories, to one year to compare with the previous year we find the following:

	FY-79	FY-80 (extrapolated)
Diagnostic Evaluations/Assessments	422	788
Case Reviews and Client Consultations	192	1008
Program Assistance (Multidisciplinary and Mental Health)	153	68
Training (Sessions)	83 to 2,414	116 to 2,784

Workload information from the month of Februar[illegible] 1980 is consistent with these projections. Approximately [illegible] (210 of 246) of the patients seen during the 90 day pe[illegible]d require some level of follow-up care or attention, by at least one member of the ICP staff. Extrapolating the patients served would mean that in excess of 850 patients would be receiving services by the end of the year, with the program staffed at current level. This would approach the limits of the capacity of the program to continue to provide quality services.

In developing an effective system, attention has been given to the need for developing a strong referral network,

backed up by first class diagnostic and evaluative services with access to specialty services available through existing medical school programs, pragmatic and practical inter-disciplinary case planning, and on-going systematic follow-up in case management to insure that recommendations are integrated into the overall care of the patient and that these are actions indeed having the desired effect.

In addition to the outreach services provided by the Indian Children's Program, the following are other activities also administered by the Program.

1. *SOMPA Project*

   There has been continuous concern that many of the testing instruments and methods utilized to test the intelligence or learning capability of Indian children are not valid because such instruments and methods are not culturally oriented or there are no existing culturally standardized testing norms. The IHS and the BIA have jointly undertaken a project referred to as the SOMPA (System of Multicultural Pluralistic Assessment) Project for the conducting of necessary research and testing to determine the possibility or practicality of establishing culturally oriented testing norms. The Project is underway at the Pueblo of Laguna and upon completion will be moved to the Pueblo of Zuni and eventually to the Navajo Reservation.

   Socioculturally appropriate norms have been established for Blacks and Hispanic children resulting in a decrease in the number of these children being labeled as psychologically or intellectually deviant. In this project a determination will be made as to whether socioculturally appropriate norms can be established for Indian children from the three tribes. The goals are to increase the validity and reliability of psychological evaluations of Indian children and thus decrease

the number of "false positives", i.e., Indian children incorrectly identified as psychologically maladjusted and intellectually deficient when standard instruments and norms are completed. Random samples of children from both sexes at each age level between 6 and 11 will be selected from each tribe.

Parents/guardians will also be interviewed. It will be determined whether it will be necessary to establish norms for each tribe. Completion of this project will make possible compliance with PL 94-142, a key requirement.

2. *Fetal Alcohol Syndrome Project*

   The purpose of this Project is to improve and broaden the scope of services presently provided to the Indian child and its mother. The Project, which has been operational since November 1979, provides for the identification, referral, diagnosis, and treatment of a child with fetal alcohol syndrome and its mother. It also provides for a broad preventive effort through increasing individual, family and community awareness of fetal alcohol syndrome. The Project is presently limited to Navajo and Albuquerque Areas of the IHS. We have received requests from other locations outside of these areas, however, without increased funding and staffing, it is not possible to expand our present scope of services.

   Currently, clinical training sessions on Fetal Alcohol Syndrome have been held at all IHS Service Units in the Navajo and Albuquerque Areas. Selected physicians, nurses, and outreach workers have received two hours of intense instruction in Fetal Alcohol Syndrome diagnosis. In the spring months screening clinics for the diagnosis of F.A.S. affected children will be held by consultant pediatric dysmorphologists. From the clinics children will be referred to appropriate health care

facilities for needed therapy and for treatment. The benefits of the program are thus threefold: 1) the children will receive needed treatment; and 2) the project will be able to establish data regarding the prevalence of this problem within the Albuquerque and Navajo Areas; 3) educational materials and preventive efforts will be developed.

3. *Convulsive Disorders Study Project*

The goals of this project are:

1) To determine the prevalence and patterning of epilepsy in several Indian populations.

2) To assess follow-up treatment care and start case registers.

3) To assess the differences in the psychiatric problems of epileptic patients.

4) To assess the differences in the psychiatric problems of epileptic patients as they may vary between tribes.

5) To make recommendations concerning education and follow-up activities suitable for each type of community studied.

The study has been completed at the Pueblo of Zuni and is currently underway among the Tewa Pueblos in New Mexico. A copy of the Zuni report is attached.

Funding for this project has been made available from the Indian Children's Program budget. It, however, appears that the project cannot be funded beyond the completion of the Tewa Pueblos study because of the insufficient resources of the ICP. The study is a worthwhile project which addresses an area which has long been neglected and should certainly be continued. The benefits derived from this project are twofold: 1) persons with epilepsy are identified; and 2) treatment and follow-up care can then be initiated.

SUMMARY/ASSESSMENT

The Indian Children's program, with assistance made available by the Bureau of Indian Affairs and the National Institute of Mental Health, has expanded its quality and quantity of services significantly. Caution must, however, be exercised in the further expansion of services because three-fourths of the total present ICP clinical staff of eleven are employed under contracts scheduled to expire at the end of the current fiscal year.

Without a significant increase in the allocation of funds and personnel ceiling, it will not be possible to meet existing program needs and to expand the service area. Without the benefit of diagnosis and evaluation of a child as a "whole", which can best be accomplished in a residential setting, or on an outreach basis in lieu thereof, handicapped Indian Children will either not be diagnosed and evaluated or suffer the consequences of inadequate diagnosis which most often results in the mislabeling of a child. Because most Indian communities do not now have nor can they realistically support a permanent multidisciplined clinical team, the services of an outreach team or a residential facility are the most viable alternatives.

PL 94-142 and the regulations implementing such Act, mandates that the evaluation procedure of a child must include a holistic approach utilizing a multidisciplinary team. We submit that the joint project between the Bureau of Indian Affairs and the Indian Health Service has demonstrated that it is a practical and economically feasible method by which the two agencies can fulfill their respective legal mandates in providing diagnostic and treatment planning services to handicapped Indian children.

There are a number of factors which contribute to the difficulties or problems encountered in the development of or the providing of services to handicapped Indian children and their families. Among these factors are:

1. Difficulties with providing regularly scheduled or fairly constant services to a large geographic area consisting of widely dispersed, isolated and small rural communities. The Navajo Reservation alone consists of almost 14,000,000 acres with a population of over 100,000 persons.
2. Inability of most communities to support financially, and on the basis of full-time need, a multidisciplinary professional staff as required to provide necessary diagnostic and treatment services.
3. Extreme difficulty in recruiting and retaining qualified professional personel willing to work under the demanding conditions of the job. Members of the outreach staff spend approximately 75% of their work week doing field work and spending on the average of two days away from home each week. The hours of work are long and irregular.
4. The distances that patients must travel to the nearest major medical facility make treatment planning and arranging for treatment services extremely difficult, if not possible, where specialized or major services are required.

The contract with the UNM School of Medicine has served to make supplemental diagnostic services available. This arrangement is, however, not without its disadvantages including the following:

1. The overall costs including charges for professional services, administrative costs, transportation, housing, and other related costs makes this arrangement a very expensive one. At the very minimum, the charge per child for diagnostic developmental evaluation without additional medical services is $1,236. Average charges in a residential facility such as the Kennedy Institute in Baltimore is $350 per day with an average stay of two days per child.

2. Acceptance of referrals and scheduling of admissions is within the total discretion of the School of Medicine. This has directly affected the ICP's ability to provide timely services and on-the-spot scheduling for its patients.
3. Patients and their parents or escorts are transported to Albuquerque via commercial means of transportation and are lodged in local hotels. Meals and local transportation are also provided. The cost for these services is in addition to the charges for diagnostic services. There is demonstrated uneasiness on the part of the patient and the parent in coming to a large city and being in a large medical setting. The lodging, meals and transportation arrangement which can be made are not conductive to the proper care or accommodation of a handicapped child.
4. There is a lack of cultural awareness or orientation on the part of the service providers, a quality considered to be essential in the proper diagnosis of and treatment planning for an Indian child. This quality has developed within the staff of the Indian Children's Program. The lack of knowledge by the service providers of available local resources necessitates close involvement on the part of the Indian Children's Program staff in the development and implementation of treatment plans.
5. The lack of internal cooperation among the Departments of the University limits the services available to the Program under the contract. Services from other Departments must be acquired by separate contracts resulting in increased costs to the Program.

ILLUSTRATIVE CASES

Perhaps the following cases will illustrate the kinds of problems and the need for the multidisciplinary approach being taken by the ICP.

"A 7 year-old girl was referred to the occupational and physical therapists of the Indian Children's Program by the Elementary School staff. This child had a history of enuresis and behavior problems, a poor family situation, learning disabilities, and some minor sensorimotor problems. This child was evaluated by the physical and occupational therapists, and specific problems were found in the sensorimotor and motor planning areas. A remediation (therapy) program was designed and taught to the school staff. School problems seemed to be increasing including teacher-student relationships and profuse wetting. A referral was then made by the therapists to the child physchologist of the Indian Children's Program and an interdisciplinary case review was planned.

Further information indicated that the enuresis exacerbated by the presence of a chronic bladder problem which was treated upon referral to the local IHS clinic.

The physchologist saw this child and reported that the child was continuously verbally and emotionally abused by her father who repeatedly denied any relationship to the child. These incidents were well-known to the school officials but they had not intervened due to fears of antagonizing the father. However, the school personnel had difficulty tolerating this child's presence not only because of the smell related to the enuresis but also because of her clinging, subservient, attitude. They often sent the child home, knowing the probability and frequency of abuse, or allowed the child to wander the school hallways. Then the psychologist from the Indian Children's Program initially intervened, the staff spoke about this child with overt angry, hostility, and frustration, saying that they could not deal with this child and wanted her sent away. They admitted to some mild abuse themselves: sitting the child on the toilet for 30 minutes, simultaneously criticizing her for her poor bladder control. Further, they had refused her participation in school parties

or outings. A staffing was held with the Indian Children's Program's Psychologist which centered on support and permission to feel angry and frustration. Explicit recommendations were made by Indian Children's Program including individual therapy for the child, supportive counseling/consultation by Indian Children's Program for the staff, and a behavioral program for increasing the child's acceptance of the bathroom facilities. Family counseling services were recruited by Indian Children's Program from the BIA social services. Presently, this child has ceased her wetting, is worked with individually by the staff, and is an active, and welcomed participant in all school functions. Her mother is receiving supportive counseling from the school counselor while the father is no longer abusing the child. The school staff appear elated and relieved. It is likely that Indian Children's Program intervention saved this child from institutionalization and the school staff from the guilt of not having been able to succeed with this child."

This is but one example of the type of cases in which the staff of the Indian Children's Program has become involved. It is difficult to predict what may have happened to the child had there not been intervention on the part of the ICP. The end results is that the child has basically overcome her medical problem and has become an active and welcomed member of her peer, family, and tribal group. Further, her father and mother have also benefited by receiving personal help in overcoming their problems.

"This 18 year-old girl resided in a vocational shelter after being expelled from four other shelters. The staff at this shelter complained that they too could not deal with her behavior. The local tribal court concurred and requested committment to the state mental hospital.

This girl had a history of various suicidal acts. She had attempted to hang herself, pinched herself in the neck so

that large bruises resulted, cut her lower arms with a razor blade resulting in a series of precise small cuts up and down the sides of her arms. Further, she broke windows, sexually molested staff and other clients. She had previously been forced to abort an illegitimate child and was beaten by her mother. Her mother and brothers were reported to have forced her to clean the hogan, fix the food, herd the sheep, and continuously beat her.

Prior to expelling her from the residential shelter, the staff consulted the psychologist and social worker from the Indian Children's Program. The ICP staff evaluated the client and made specific recommendations about problems to be addressed in individual sessions with the client to assist her in learning new ways to more appropriately interact with staff and clients. During subsequent staffings the staff noted significant improvement in her behavior a total absence of suicidal gestures, improved work performance, and less sexual acting out. The staff were willing to keep this woman in the shelter but felt that long term placement would be more appropriate. Indian Children's Program recruited the help of B.I.A. social services, and the vocational rehabilitation agency in designing long term treatment plans while ICP staff continued to consult with the staff and assist them in counseling this girl."

"This 33 year-old woman and her 10 year-old son came to the attention of ICP due to abuse by the 10 year-old of his mother and the mother's inability to control the child. The mother was previously hospitalized for a psychotic reaction and had a history of treating her child as an infant: i.e., having great difficulty separating from her child and caring for her child's growing needs. She would buy multiple bicycles instead of buying food or paying the rent. The staff at the residential shelter was unable to deal with her hallucinations and her intrusions on her son during school hours. They requested that she leave

the facility. She lived for a while in a nearby community but was unable to maintain a job since she frequently left work to visit her son at school. At that time, she was receiving counsel from a local mental health team and assistance from B.I.A. social services. Without money and with growing bewilderment on the part of B.I.A. social services, she returned to the residential shelter while her son was placed in an adjacent boarding school. The staff, though, once again complained about her lack of work incentive and her constant verbalizations about her worries about the whereabouts and health of her child. The staff brought the case to the attention of the psychologist and social worker from I.C.P. At the original staffing, it was agreed that an evaluation of the son was needed as well as an evaluation of the relationship between the son and his mother. The evaluation resulted in multiple suggestions presented to a staffing including the following participants: psychologist, social worker, vocational rehabilitation specialist, (all from I.C.P.), B.I.A. social services, a vocational rehabilitation person from the Tribe, a counsel from the schools, the staff from the residential shelter, and paraprofessional counselors from the local mental health team.

The staffing resulted in cooperation between I.H.S. vocational rehabilitation representative and B.I.A. social service worker in planning for separate long term placements for the woman and her son, individual counseling for mother by a Navajo counselor from the mental health center, support consultation of the staff from the residential shelter by I.C.P., counseling of the boy by the school counselor, and coordination/consultation by I.C.P. Previously, this case was a long standing one which continued to frustrate all the participants. Presently, the mother is working with the staff and allowing her son to attend school and to begin to develop emotionally, socially, and cognitively."

Realizing the lack of services for handicapped Indian children, one cannot help but be concerned about the hundreds of children like these children who have never had and may never have the benefit of services of a program developed especially for them.

The Indian Children's Program, as evidenced by this report, has accepted the challenge of developing, implementing, and providing, or assuring the provision of meaningful and much needed services for handicapped children, their families, and their communities. However, we have only "scratched the surface". With the allocation of adequate permanent funding, employment ceiling, and support the ICP has the potential and desire for continued growth and expansion.

EXHIBIT D

UNDUPLICATED COUNT OF PATIENT REFERRALS BY PROBLEM AND AGE GROUP SEEN BY INDIAN CHILDREN'S PROGRAM

	Nov. 1, 1979 thru Jan. 30, 1980							February 1980						
DISABILITY [1]	0-2	3-5	6-12	13-18	19	Total	% of Total	0-2	3-5	6-12	13-18	19	Total	% of Total
Deaf					1	1	1						0	
Deaf/Blind						0							0	
Hard Hearing	1	1	1			3	1			1			1	1
Mentally Retarded	5	15	16	13	11	60	24			7	5	2	14	17
Multi-Handicap	6	13	17	13	8	57	23	1	2	4	2	1	10	12
Ortho Impaired	1	3	5	4	2	15	6		2	4	4	1	11	13
Other Health	4	4	2	2		12	5						0	
Seriously Emotion. Dist.			8	13	5	26	11	1	2	12	7	3	25	30
Specific Learn. Dis.		3	13	5	1	22	9		1	3	3		7	8
Speech Impaired			6	1	1	11	4		4				4	5
Visual Handicap	2	1				3	1						0	
Non Handicap [2]	2	8	20	5	1	36	15		2	8	1		11	13
TOTAL	21	51	88	56	30	246		2	13	39	22	7	83	99

[1] For purposes of this report, the categories of disabilities are those defined in 121a.5 of PL 94-142. FR 42-163, 1977.

[2] This category represents patients who were referred for evaluation, evaluated and a determination made that their problems were not of sufficient severity to require further action by Indian Children's Program.

EXHIBIT E

INDIAN CHILDREN'S PROGRAM
MARCH 1980-FEBRUARY 1981

	Diagnostic Assessment	Case Reviews	Program T/A	Direct Services	Training Session/People	
Speech	299	144	7	11	30	318
Educational Diag	255	250			5	100
O.T.	238	69	34	44	30	299
P.T.	255	49	16		22	262
Art		10	1	629	43	411
Medical	163	63	23	30	6	110
Voc. Ed.	138	236	30	24		
Therapy				48		
Social Service		205	46	4	4	60
Psychological	90	228	40	102	43	728
Neurological	8	8				
Psychiatric	107					
Medical School	124	162				
Convulsive Disorders	200	245	5	800	15	400
FAS	134	134			94	3199
	2011	1803	202	1692	292	5947

Served 213 programs on 47 Reservations.

Do Not know total # of children served just services offered.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
HEALTH SERVICES ADMINISTRATION

Indian Children's Program
Indian Health Service
2401 12th St. N.W.
Albuquerque, New Mexico

07 Apr. 1981

MEMORANDUM

To: Assistant Secretary for Indian Affairs
Director, Indian Health Service

From: Director, Indian Children's Program
Co-Director, Indian Child Study Project

Subject: Yearly Report—Indian Child Study Project

In June 1979, in conjunction with directives from Congress, The Bureau of Indian Affairs and the Indian Health Service entered into a cooperative pilot project to determine the feasibility of both agencies jointly operating a project to provide diagnosis, treatment planning, and treatment services for handicapped children; and to develop a position in the need of a multidisciplinary medical/education facility to provide these services. This report covers the results of six months of planning and implementation, and the next year of services.

On September 13, 1979, the Bureau of Indian Affairs allocated $350,000 of year end money to the Albuquerque Area Office. This money was utilized through contracts, to support and supplement the existing Indian Health Service-Indian Children's Program with:

A. Additional Staff

2 Educational Diagnostician
1 Art Diagnostician/Therapist
1 ½ Speech Pathologist
1 Developmental Psychologist
1 Vocational/Rehabilitation Therapist
1 Physical Therapist
1 Occupational Therapist
1 Recreational Therapist
Clerical Support

B. Funds for related costs of transportation and lodging of patient children and their parents brought to Albuquerque, New Mexico for diagnosis and evaluation through the University of New Mexico School of Medicine.

C. Funds for initiation of the SOMPA Project.

The Indian Health Service-Indian Children's Program, also received an allotment of year-end funds which were obligated via contracts to the University of New Mexico School of Medicine to provide diagnostic, evaluative, treatment planning, and limited treatment services for handicapped children referred by the Indian Children's Program on either an inpatient or outpatient basis. These services were intended to be utilized where such services were not available locally or could not be provided by the staff of the Indian Children's Program or other local resources. In addition, the Indian Children's Program made available to the study project its regular program staff consisting of the following disciplines:

A. Clinical Psychologist
Social Worker
Occupational Therapist
Speech Therapist
Child Psychiatrist

In July 1980, the Indian Children's Program submitted a LEA (Local Education Agency) application for P.L. 94-142 funds to the Bureau of Indian Affairs. This was approved for $127,521 to provide the following support:

A. 2 Educational Diagnosticians
1 ½ Speech Pathologist
1 Physical Therapist
1 Occupational Therapist
1 Recreational Therapist
2 Clerical Support

The funds were year-end funds and contracts were utilized for expenditures during the period of September 1, 1980 through September 30, 1981. The Albuquerque Area was designated as the support group for this project and Ms. Ann Crawley, of the Albuquerque Area Education Division was appointed Co-Director of the Indian Child Study Project. The Indian Health Service increased the number of permanent positions and through year-end funds contracted for additional personnel and support. This included:

A. 1 Art Diagnostician
1 Social Work Associate
1 Vocational Educational Specialist
2 Developmental Psychologist
1 Developmental Pediatrician

Over this report period, the increase in staff has resulted in an increase in capability to provide services. Attached is a detailed report of the services rendered during the reporting period including information as to the number and types of services provided and the findings. The initial service area was limited to the Albuquerque and Navajo Areas, and the Hopi Reservation within the Phoenix Area. As the service capability was increased, the referrals also increased in a disportionate ratio. Recently we experienced a large increase in referrals from the Phoenix Area. Arrangements were made for limited

services to the Papago and Pima Reservations. Recent requests have been received from groups in Wisconsin, Oklahoma, and Nevada for services and assistance in the development of multidisciplinary diagnostic team.

The conclusions which can be drawn from this reporting period are as follows:

1. There is a tremendous unmet need for diagnostic and evaluation services for all Indian children and a tremendous unmet need for treatment planning, consultative, treatment and follow-up services for handicapped children and their families.
2. There is a serious shortage, a lack of available local resources to meet such needs.
3. The multidisciplinary team approach is a viable means of partially meeting such needs.
4. Replication of the multidisciplinary outreach team at other site locations is warranted and would result in enhancement of access to services and the beneficial use of available funds.
5. The current level of permanent funding and program staffing is grossly inadequate to meet existing needs and the growing demands for services.
6. A program of direct treatment services must be implemented.
7. The current level of permanent (recurring) funding and position allocation is grossly inadequate to meet existing needs.
8. The multidisciplinary outreach team approach is a workable and practical approach to a cooperative effort of providing such services to Indian children by the Indian Health Service and the Bureau of Indian Affairs. It not only makes available specialized personnel to provide comprehensive services within the least restrictive environment, but permits both agencies a means of meeting the legal mandates of P.L. 94-142 and P.L. 94-437.
9. A residential multidisciplinary medical facility with educational support is needed to provide services where local resources are totally non-existant or severely limited, and where the handicapped conditions of children are so severe or such that the services of an outreach team would be inadequate.
10. There is a severe shortage of culturally-oriented, reservation based residential treatment facilities for the severely or profoundly handicapped Indian Children.

The multidisciplinary outreach approach, as stated, is a viable and responsive means or method of providing services to Indian children within a reservation or rural setting. It may be viewed by some as being an expensive way of providing services. However, one must recognize that the seeming high cost must be attributed to the geographic remoteness of communities served; the cost of acquisition of professional services including professional staff salaries; high program operation costs due to increased cost of transportation, lodging and related expenses. It should also be noted that the children seen by a team of this type are frequently children with multiple handicaps who need a multiple, comprehensive, integrative approach to the diagnosis and treatment and rehabilitation of their disorders. An early comprehensive intervention may appear expensive initially, but if rehabilitation can be initiated earlier and can carry the child farther than has been the case in the past, then, of course, the long term costs of the care for the child are reduced. It should also be remembered that one of the other functions of the multidisciplinary outreach team is to provide training and consultative support to community based programs to improve the local capability to

support handicapped children to their own communities. Frequently, no other professionals are available to provide this kind of service on an ongoing, continuous basis. In the long term, costs for the care and maintenance of children are reduced.

The Indian Children's Program through the Indian Child Study Project implemented the following action items as a result of the first report and its findings:

1. The Bureau of Indian Affairs contracted for a portion of the outreach services utilizing both BIA and IHS funds. The cooperation, resourcefulness and knowledge of BIA administrative personnel and in particular the contracting officer, has streamlined the acquisition of administrative services for contract personnel and has enhanced the responsiveness of the Indian Children's Program in providing its services.
2. Internal operating processes and space arrangements were developed and implemented in a manner so as to promote better staff utilization, coordination of services to communities, as excellent line of communication, and the most economical and beneficial use of funds and resource made available to the Program.
3. The service population of the Indian Children's Program was determined to be a combination of those eligible from both agencies thereby accomodating all Indian children.
4. Established regularly scheduled monthly screening clinics at several locations utilizing IHS and community health clinics.

The Project has not been totally without problems. The following is a partial list of some of the problems or situations which have had a direct affect upon our ability to implement the project on a timely basis and to maintain its operation in the least restrictive environment:

1. The imposition of travel restrictions and mandatory mileage reduction has forced a curtailment of some field activities. No immediate solution is foreseeable, however, efforts at resolution will continue.
2. A substantial portion of the funds being used for current operations are non-recurring funds which were made available at year end leaving little, if any, flexibility to adapt to actual program needs or for inclusion as a resource in planning or developing future program plans and operations. The allocation of recurring funds (year-by-year funding) is essential if the program is to be maintained at a level which can be responsive to meeting needs, priorities, and commitments.
3. The extent of the Bureau of Indian Affairs' (Project Co-Director) involvement in the Project has been on an interim or part-time basis. There is a demonstrated need [f]or full-time involvement. The proposed revised organizational structure of the Indian Children's Program and the requested financial participation and permanent ceiling request of the Bureau of Indian Affairs, (See attachment) if approved, will facilitate such involvement.

There is currently within both agencies a lack of adequately defined service jurisdiction among closely related program activities. This exists primarily at the headquarter level of both agencies as evidenced by the problems of territoriality and accusations of infringement upon the other's servicing jurisdiction. This has resulted in the development of the lack of clearly defined service responsibilities and jurisdiction at the local and field level.

There has been a lack of consistent involvement from the Central Office staff of both agencies, and a continuous shift in people. As new individuals become involved,

the direction, expectations, and requests change. Finalization and approval of a long term memorandum of agreement along with expected data requirements and issues to be addressed will solve this.

The lack of sound, reliable, and responsive administrative services, namely contracting and personnel, within the Indian Health Service at all levels has seriously hampered program operations. The Program directorship must devote an inordinate amount of time in pursuit of administrative services to the neglect of community relations and program operations.

The past period of the pilot project has demonstrated that it is not only possible but that [it] is practical, feasible, and more economical for the Bureau of Indian Affairs and Indian Health Service to have a joint or shared relationship where there is commonality or related service responsibility. We, therefore, recommend that the Bureau of Indian Affairs and the Indian Health Service:

1. Continue to operate a joint program designed to provide a combined medical-education diagnosis, evaluative, treatment planning, consultation and treatment services for handicapped Indian children.
2. Replicate the multidisciplinary team concept at other site locations.
3. Allocate adequate funding and personnel resources to permit the operation of a meaningful and successful program.
4. Proceed with necessary action for the planning and design of a residential diagnostic, treatment planning and treatment center.

Director, ICP

Co-Director, Indian Child Study Project

DEPARTMENT OF HEALTH AND HUMAN SERVICES

17 Jul. 1981

MCH Program Coordinator
Indian Health Service

Comments and Recommendations—
Indian Childrens Program

H.C. Townsley, M.D.
Director Office of Mental Health Programs
Thru: Director, Division of Program Operations ——
Chief, Medical Officer ——

As per our agreement here are my thoughts and conclusions about the present functions and activities of the Indian Children's Program. Also presented are my recommendations about the future of the program.

First let me say that I am impressed with the dedicated staff that has been assembled to try and work with handicapped children. I am also impressed with what they are trying to do and hope that my comments and recommendations are not considered as criticisms of them but rather as my perceptions of the needs of multiple handicapped children throughout the entire IHS service area.

First: Comments about the present program.

1. It still is not clear to me what data has been used to determine the present functions and goals of the program. It appears that the program will accept any referral that comes in and then try to meet the need.

   Questions:

   A. How many "handicapped" children are there?
   B. What geographical area needs services?
   C. What services are needed and where?
   D. What existing services are available?

2. Politically and clinically the program is tied too tightly to the Albuquerque Area.
3. The program is becoming diversified into service research and contract program some of which are not necessarily related strongly with handicapping conditions.
4. There seemed to be a feeling from the staff that this program should remain autonomous from the rest of the IHS system. The lack of communication with IHS program staff appeared over and over again.

Second: Recommendations for the present program.

1. The present program should justify it's existence through presentation of hard data showing IHS needs in relation to handicapping conditions and data to prove that present program is meeting those needs efficiently and effectively.
2. Program must be integrated into the IHS comprehensive care system at the national, area and service unit level.
3. Management by objectives planning should be instituted immediately in conjunction with Maternal and Child health programs throughout IHS.
4. Program accountability should be strengthened thru the Division of Program Operations at Headquarters rather than through Division of Resource Coordination.

Thirdly: My recommendations for change in the program.

1. The program should become a national IHS program rather than a regional program.
   A. Integrate with the IHS child health programs to act as an advocate for multiple handicapped children by,

(i) Collecting and reviewing hard data for handicapping conditions so that management by objective planning can occur that will provide needed services to handicapped children.

(ii) Act as an instructor and motivator to child health staff in each area about the needs of handicapped children and how those needs can be met.

(iii) Review what services are presently available in each area and show areas how to more efficiently network these services.

(iv) Deliver clinical services to individual service units by evaluations, diagnosis, development of treatment plans, and monitoring of care of previously identified and screened service unit populations making sure that the primary responsibility of each child remains with the local health and education providers.

2. Integrate present Fetal Alcohol syndrome training and diagnosis with the activities as in A above.
3. Develop preventive programs for those handicapping conditions identified as most significant and most easily prevented.
4. Reevaluate present research projects and separate them from the Indian Childrens Program thus freeing up additional funds for direct services.
5. Evaluate present and future relationships with the BIA Office of Indian Education in regards to funding and program demands.
6. Support and supplement existing school health programs at the service unit level especially in regards to health needs of the handicapped.

In summary the two most important changes needed are (1) Integration of this program with the other child health programs of IHS by better communication and planning, and (2) Making this a National IHS program rather than a regional program.

Thank you for permitting me to make these comments.

ROBERT C. KREUZBURG, M.D.
Chief
Maternal and Child Health

cc: Ken Fleshman, MD
Senior Clinician Pediatrics
/s/ K.R. Fleishman

Prepared by: IHS/DPO/KREUZBURG/dnmnm/7-2-81

SIGNIFICANT ITEMS
HOUSE REPORT NO. 97-942
FY 1985 APPROPRIATIONS

ISSUE

Indian Children's Program—The House Appropriations Committee has stated that it ". . . . is pleased to hear of the continued success of the Indian Children's Program, and expects the Indian Health Service to include information in next years' budget justification regarding its participation and details of funds to be provided to this effort."

BACKGROUND

The Indian Children's Program (ICP) was begun by the Indian Health Service (IHS) under the authority of P.L. 94-437. In 1979 the Office of Indian Education Programs of the Bureau of Indian Affairs (BIA/OIEP) joined to support what has evolved into a true interagency activity.

The ICP has both a regional and national focus. Regionally, the ICP serves as an interagency project for emotionally, educationally, physically, and mentally handicapped American Indian children and youth in the southwest. For individual children, the ICP provided diagnosis, evaluation treatment planning and follow-up services. For parents, community groups, school personnel and health care personnel, the ICP provides training in child development, prevention of handicapping conditions, and care of the handicapped child. Nationally, the ICP is limited to providing training programs to the IHS and BIA service providers and community groups. It is, on occasion, involved in the care of individual handicapped children outside of the southwest. Because of the distance between the ICP in Albuquerque and handicapped American Indian children in other parts of the country (e.g., South Dakota), the ICP is attempting to develop a sys-

tem of care under which children could be seen by programs near their home. To that end, IHS and BIA/OIEP have entered into an agreement with the American Association of University Affiliated Programs for the Developmentally Disabled (AAUAP) to provide individual diagnostic evaluation and treatment planning services by member programs closer to the child's community.

Financially, the ICP is supported by both IHS and BIA/OIEP approximate 65:35 ratio. IHS base funds are expended under the Mental Health [illegible].

INTERAGENCY AGREEMENTS

	IHS Direct	IHS	BIA	NIMH	TOTAL
FY 1981	$599,205	$191,284	$129,000	$71,400	$990,889
		(from FY 81 $)			
FY 1982	450,200	110,000	297,306	72,600	936,106
		(from FY 82 $)			
FY 1983	520,500	116,127	334,096	0	970,723
		(from FY 83 $)			
FY 1984	520,500	130,000	[1]	0	[1]

[1] The BIA FY 1984 resources to be included in the interagency agreement have not been determined as yet.

ACTION

The Indian Health Service will continue the activities of the Indian Children's Program at the same level in 1984 as in 1983. IHS and BIA/OIEP will continue to share policy control.

The IHS and BIA will also continue discussions begun this year designed to develop a coordinated network of care for handicapped American Indian Children. It is hoped that out of these discussions will emerge a plan for a national partnership among federal, state, local, tribal governments and private organizations.

[SEAL]

DEPARTMENT OF HEALTH &
HUMAN SERVICES
Public Health Service
Indian Health Service

Indian Children Program
2401 12th St., N.W.
Albuquerque, New Mexico 87102
505/766-6675 766-2122

June 28, 1985

To: ICP Referral Sources

The ICP is currently re-evaluating its purpose and functions as a national mental health program for Indian children and adolescents. Historically we have been able to provide monthly consultation with people working with children identified as handicapped. This has been a rewarding activity both for us and for those we have served. The ICP, however, needs now to reassess how we may most effectively serve Indian children not only in the Southwest but among all Indian people across the nation. As you may sense, this is a difficult challenge, but we are hopeful that the ICP will emerge from this process as a program able to enhance the mental health of Indian children in an even more effective manner.

During this process of transition we will not be able to respond to clinical needs in the usual manner. We cannot accept new referrals except in emergency cases. We will see children whose referrals have been received prior to your receipt of this letter. We urge you to research other resources for your children, and we will be of any assistance possible in this search.

We as a staff are very concerned about continued care for the children we have served, and we will be actively involved in assuring continuity of care. We will keep you informed of the progress of our transition.

If you have any comments or questions, please feel free to contact us.

Sincerely,

/s/ Teresa Makowski
TERESA MAKOWSKI, PH.D.
Acting Clinical Director, ICP

/s/ Linda M. [illegible]
MARY ELLEN (MICKEY) PIERCE, M.S.
Acting Director of Administration, ICP

Appendix A

ICP STATISTICS

MARCH 83-JULY 1985

Month	New Contacts	F/U Contacts	Total Contacts	# Sites	# Sessions/ # People
March 83	45	70	115	32	6/313
April 83	45	55	100	29	7/570
May 83	39	67	106	27	15/421
June 83	45	80	125	21	2/35
July 83	60	71	131	21	1/8
August 83	51	65	116	22	6/162
September 83	26	90	116	32	5/180
October 83	25	96	121	27	5/101
November 83	58	49	107	21	5/95
December 83	29	93	122	29	7/79
January 84	35	129	164	32	4/69
February 84	56	91	147	29	6/166
March 84	35	122	157	30	8/96
April 84	49	93	142	36	10/91
May 84	41	100	141	34	9/128
June 84	35	106	141	18	6/161
July 84	32	120	152	24	3/20
August 84	40	108	148	25	7/197
September 84	42	138	180	38	9/305
October 84	22	123	145	35	9/270
November 84	34	103	137	33	12/145
December 84	22	40	62	18	10/485
January 85	42	139	181	35	8/117
February 85	34	130	164	24	6/85
March 85	18	72	90	24	8/187
April 85	44	85	129	27	9/132
May 85	42	101	143	28	6/122
June 85	6	58	64	12	1/122
July 85	8	45	53	13	2/67
TOTALS	1,060	2,639	3,699		192/4,983

#3722

UNITED STATES GOVERNMENT
MEMORANDUM

DATE: August 21, 1985

REPLY TO
ATTN OF: Acting Clinical Director, ICP
Acting Administrative Director, ICP

SUBJECT: Termination of Direct Clinical Services

TO: Service Unit Directors
Area Directors
Referral Sources

As you are probably aware, the Indian Children's Program has been involved in planning activities focusing on a national program effort. This process has included the termination of all direct clinical services to children in the Albuquerque, Navajo and Hopi reservation service areas. During the months of August and September, ICP staff will be seeing children followed by the program in an effort to update programs, identify alternative resources and facilitate obtaining alternative services. In communities where there are no identified resources, meetings with community service providers will be scheduled to facilitate the networking between agencies to secure or advocate for appropriate services.

Much effort and thought have been devoted to the accomplishment of an orderly and adequate termination of the direct service component of the program. We understand that this is a difficult transition for all involved, and we are motivated by our goal of increased mental health services for all Indian Children.

During our planning process we invite your input on how we may best assist you and your area in securing the types of services that have been provided by the Indian Children's Program. Direct clinical services are more appropriately provided on a local level and we can best serve children needing those services by providing you

with technical assistance in obtaining more local resources.

Please feel free to contact us if we can assist you with this change. Thank you for your support in the past and we wish for your continued support in our new effort.

/s/ Mary Ellen Pierce
MARY ELLEN PIERCE, M.S.

/s/ Teresa Y. Makowski
TERESA Y. MAKOWSKI, PH.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV-86-1182 JB

GROVER VIGIL, ET AL., PLAINTIFFS

vs.

EVERETT R. RHOADES, ET AL., DEFENDANTS

THE DEPOSITION OF ALBERT HIAT

Taken by the Plaintiffs, pursuant to the Federal Rules of Civil Procedure, taken at 9:10 a.m. on the 27th day of May, 1987, * * *.

* * * * *

[21] Q. Without dragging us through every single year of the project's life, I would like to get some sense from you—and again we're not trying to put words in your mouth—of how much the staffing of the project changed over time. These memos help us establish what was going on in 1979. Would it be or would it not be correct to say that the staffing [22] remained pretty much at that level until 1985?

A. In terms of the mix of people, it was basically the same. There may have been some additions and some changes, but you know basically we had a mixture of therapists, of different types of mental health people and medical people.

Q. But the number of authorized positions didn't change radically at any time in that six years?

A. Well, I don't remember. But again, it fluctuated. You know, we had different numbers of people at different times, and a lot of that had to do with being able to hire people. At various times, people in these categories were difficult to hire. They were very much in demand, at least, and it was difficult to attract people who were willing to travel, so there were some fluctuations in staffing.

Q. Would the fluctuations—I took down a list very quickly, and let me just read it back to you. I believe this is from your testimony before. And certainly if it is inaccurate, you can change it. But you characterized the staffing as having a pediatrician, a child psychologist, two additional clinical psychologists, a developmental psychologist, two physical therapists, two occupational therapists, a social worker, a social worker associate, a vocational rehab person and two education diagnosticians. That would be 14, and yourself would be about 15 positions. Is that—

[23] A. Yes, but that varied. It went up and down, I'd say, by three or four people sometimes.

Q. So at the height of it, you might have had 19 to 11? Would that be a correct range?

A. Yes, or say 11 to 15 or 16. I don't think it ever went as high as 19 approved positions. And I'd like to make another correction. There was a child psychiatrist.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted in Printing)

THE DEPOSITION OF
MARY ELLEN SANCHEZ

Taken by the Plaintiffs, pursuant to the Federal Rules of Civil Procedure, taken at 9:30 a.m. on the 29th day of May, 1987, * * *.

* * * * *

[43] Q. I'd like to ask you some questions relating to —let me ask you first: Were you involved in closing out the clinical cases?

[44] A. Yes.

Q. What was your involvement in that?

A. We had meetings where we took communities and —let me back up. We met as the clinical staff and, by community, identified those children in the community that we were seeing on an ongoing basis. From that, lists were compiled, by community, of the children that were being seen, and we met to decide who would write a case summary on each child. And in most cases, it was the primary service provider who would be following that child. But because of the BIA staff not being able to be actively involved, there were a number of children who, their active caseperson was a BIA staff who could not be involved, so we split that work up among those of us that were left.

Q. Who all was involved in the process you've just described?

A. Catherine Baca, who was the pediatrician; Katherine Burke-Griffin, who was the speech pathologist;

Mary Thompson-Hudson, the physical therapist; Teresa Makowski, the clinical psychologist; myself. That was it.

Q. And do you remember how many cases you had to close out, how many cases there were at the time you started this closing out process?

A. There were around 400.

Q. So that would mean that each person was doing [45] approximately—let me divide quickly—75 to 100 cases?

A. No, we didn't divide them like that. What we did was, the ones that were more motor related Mary Thompson-Hudson did because she's a physical therapist and she could read the charts and interpret that information. The ones that were more speech related, Kathy Burke-Griffin did those. They did significant numbers of the work. The pediatrician, Catherine Baca, did a significant number because she was a pediatrician and understood diagnoses. Terry Makowski did the mental health cases. She was a psychologist and could interpret those. And I kind of did those that were left over.

Q. That nobody else wanted?

A. Right.

Q. What goes into a case summary?

A. There was a lot of discussion about what to include. We included some background information, as I remember, and we had what our role was with that child. For instance, if a child was involved in Head Start and we were providing evaluations and monthly follow-up, that's what it would say. We talked about the background a little bit and we talked about our involvement or our current role with that child, and then the plan as what we thought should happen so that services would continue with that child. I don't remember if there were other sections involved in it or not, because there was a format that we followed so that they would all be in the same format.

[46] Q. Once those case summaries were written, what happened to them?

A. We had a community meeting in each community. And before we had the meeting, we identified community coordinators or contact people, who were asked from our end if they would coordinate the meeting plus also be responsible for receiving the case summaries and for assuming the role of case manager for these children.

Q. What do you mean by "case manager"?

A. Case manager would be that she would—if there were resources available in the community, she would match those resources with the children. If there were not resources in the community, that some sort of periodic review of the child's chart or an appointment would be made to review that chart with a pediatrician or whoever was available in the IHS facility.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted in Printing)

THE DEPOSITION OF
WILLIAM B. HUNTER, III

Taken by the Plaintiffs, pursuant to the Federal Rules of Civil Procedure, taken at 10:00 a.m. on the 17th day of July, 1987, * * *.

* * * * *

[99] Q. When you first became Acting Chief in January of 1985, was that the first time that you really had responsibility for the Indian Children's Program of any nature?

A. Yes.

Q. And you were taking over from Dr. Townsley?

A. No.

Q. Excuse me, which—

A. Dr. Ellis.

Q. Did Dr. Ellis give you any particular instructions about the Indian Children's Program?

A. No. There was no reason why he should.

Q. Nothing in particular was going on in regard to issues with that program at that time?

A. Oh, yes, they had been going on from the time I came into the Indian Health Service, the inappropriateness of some of the services that we were providing that were direct services.

Q. Tell me a little bit more about that. When did you [100] first hear that—I can't reproduce the phrase, but

the phrase you just used, the inappropriateness of the services, when did you first hear that and from whom?

A. The first time that I heard it discussed was in the fall of 1983, when several of us went back to Rockville, and the fact that the Indian Children's Program was a national program providing direct services to a small, relatively small, regional area was discussed. I don't remember the nature of those conversations. I had only been in the Indian Health Service for a month or so, and I was meeting new people. That was the first time I went back to Rockville. It came up off and on again over and over.

Q. Can you recall who was making those remarks in Rockville? I don't mean necessarily any one person, but a group of people or several people. Can you put any names with that?

A. Dr. Krusberg was talking about it. It was a subject of discussion and disagreement in our office—

Q. The Mental Health—

A. Well, I mean within the Indian Children's Program. And the people in the Mental Health Programs Branch wouldn't get together and just talk about the Indian Children's Program, and it came up in rather interesting sorts of ways in the areas.

Q. Can you expand on that? What were the different sorts [101] of ways?

A. Well, I would hear that the areas didn't know what the Indian Children's Program did. I remember specifically being down at Mescalero and mentioning the Indian Children's Program because I was trying to promote the Indian Children's Program to Mr. Hardwick, who was then the Area Director of the Albuquerque Area. And he said, "I sure would like to know what they do in Albuquerque, in the Albuquerque Area."

Q. Within the Indian Health Service?

A. Yes. That's not to say they weren't doing anything.

Q. You mentioned that Dr. Krusberg, back at the national office, had this concern. Can you recall what his title was at that time?

A. No, I can't.

Q. Would that have been when he was Dr. Vanderwagen's superior?

A. At that point in time I don't think Dr. Vanderwagen was even in Rockville. I think that there was a Dr. Swetter who was there. There was a Dr. Paulson, who then was in the position that Dr. Vanderwagen came to occupy relative to us. Dr. Swetter was over us and Paulson was over us. I didn't know these people. There was such a turnover, I never really got to know them, except for Dr. Vanderwagen.

But you know, the concerns about the thrust of the program with a major part of its resources going to local [102] endeavors were expressed from the time I came in. And I think the expressions that I heard, the concerns, came from the fact that the services provided were not what was originally the intent of the Indian Children's Program, which was to have been the Indian Children's Village. And as a result, what was to have been a resource for all Indian people, all Indian handicapped children, nationally, had become focused on essentially a chunk of the Albuquerque Area, the majority of the Albuquerque Area and part of the Navajo Area and a very selective part of the Phoenix Area.

And the Headquarters concern back in Rockville resulted from the justifiable resentment on the part of all the other areas that services that they had been promised weren't forthcoming and these services were being focused in a very narrow segment of the population, who were being provided, even with the services provided by the Indian Children's Program, being provided very inadequate services, and the other areas were getting nothing.

Initially it was to have been a residential treatment center which was a resource to the entire Indian population, the population of handicapped Indian children.

Q. So that was the concern, that it was providing a service to a local area, and was a national—

A. It was a national program.

Q. And that was expressed by Dr. Krusberg? Was it [103] expressed to you by other people when you first started in 1983 or later on?

A. I'm sure it was because—I don't know who, but it seemed to me that it was a general topic of conversation. It wasn't a major topic of conservation. I mean we talked about a lot of other things, you know, when we'd go back to Rockville. But if someone would offhand say, "How are you all going to keep justifying that program?" I mean it seemed to me that it was a theme that had become emergent before I came in and continued to do so.

Q. Isn't it generally true that there is a variance in services throughout the Indian Health Service from area to area?

A. I think that there are.

Q. But this was seen as a big problem specifically with the Indian Children's Program?

A. There's no question about the disparity in services. The question had to do with the appropriateness of focusing ongoing—some form of ongoing clinical services out of a national office into a small area. So that the question was, as I understood it, should—the Indian Children's Program was to be a national resource, not a local resource, and the concern was how to make it a national resource.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted in Printing)

DEPOSITION OF W. CRAIG VANDERWAGEN, M.D.

* * * * *

[33] Q. What kind of services did the ICP provide your clients?

A. Staff.

Q. Your staff?

A. And the patients.

Q. And the clients' staff.

A. They would come out periodically, and it was in [34] the range of six to eight weeks, and with prior agreement with our local people, various children would be brought in for diagnostic evaluation, primarily. That was the primary function from our point of view.

They would provide consultation to the pediatrician, in particular, as to was his diagnosis essentially correct and might expand his diagnosis a bit, in terms of the particular needs for disciplined, specific kinds of activity.

An example, a child with cerebral palsy, longstanding, well-known, not a new case, they might come and assess progress, or lack thereof, or regression in the tonus of the muscles and the flexibility of the limbs and that sort of thing and provide some diagnostic, prognostic information for the pediatricians or the community health nurse, who would do outreach with the patients, and the parents were usually present as well.

The responsibility for following through on any treatment modalities for these children, basically, was ours.

That is, through the use of local resources, staff, contract health service dollars, Crippled Children's, United Way, whatever resources we could bring to bear on [35] the issue to do follow-up services, based on some of their prognostic and diagnostic input, which was confirmatory and expansive to the pediatrician's existing diagnosis.

Q. When you say, "Crippled Children's," what were you referencing, is that some sort of agency?

A. Yes, it's a state funded—well, actually, I think it's a private, nonprofit entity in the State of New Mexico, which provides funding for various services for children. That runs the gamut from paying for level-three nursery care for newborns, high-risk pregnancy up to services for kids with cerebral palsy or other physically disabling conditions.

Q. Is that separate from the Carrie Tingley, from the chillren's hospital or—

A. Yes.

Q. That was a separate entity?

A. Sure. Again, another resource that was available to us, but, again, we used them when they could help us with what we needed done.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted in Printing)

DEPOSITION OF ANN GALLOWAY-LEIGH

BE IT REMEMBERED that on to-wit, the thirtieth day of September, 1987, this matter came on for the taking of the deposition of ANN GALLOWAY-LEIGH * * *.

* * * * *

[63] Q Did the BIA-ICP continue to receive all the funding that it had originally been receiving?

A Yes.

Q To this date?

A Yes.

Q And that funding involved the providing of direct services?

[64] A Yes, that's what it was for.

Q Just in the southwest area?

A Yes.

Q So does the BIA-ICP still exist?

A There is no BIA-ICP by name, the services provided under contract are continuing to date because of the confusion. Because the ICP was not doing services, it was decided to change the name so that it would be a bureau function with a new name, same services provided.

Q And when did that decision take place?

A December, January of '85.

Q And what was the name changed to?

A ISET, Indian Student Evaluation Team.

Q Was there any difference in the function of ISET?

A ISET provided services to bureau enrolled handicapped or suspected handicapped children, the same as ICP had.

Q What would be the differences?

A The difference is that the bureau funding did not allow us to see children who were not legally enrolled in bureau schools. Having IHS funding allowed us to see—or allowed the program to see other students. The bureau funding has always been mandated to those legally enrolled in bureau schools, so we didn't—I mean "we" became a separate team.

* * * * *

[104] Q I have a question that dates back to a question we discussed earlier. Were actual therapy services ever provided by ICP staff to individual children?

A Define "therapy service," from your term for me.

Q Laying on the hands, physical therapy.

A Let me define for you, if I can, what we call it. There are two types of therapy service; one would be direct or primary therapy which would be a professional who would provide services at least on a weekly basis. The Indian program did not do that. We never provided, and could not provide, weekly services. We could not be the direct or primary therapist.

[105] There's another level of therapy called consultative or secondary. That would be either you consult with the primary therapist for ideas, or you work with paraprofessionals, train them to do daily or weekly therapy, and you would be their professional back-up who might see them monthly or over a couple of months. That type of therapy we did work with.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted in Printing)

PLAINTIFFS' INTERROGATORIES TO DEFENDANT ROSS SWIMMER

1. Describe in detail the creation and operation of the ICP, including but not limited to the date on which the ICP was created, the mission of the ICP, and the services, if any, provided to individual handicapped children by the ICP.

ANSWER: ICP was created by IHS and operated by IHS prior to BIA involvement. The Bureau became involved by a directive through Congressman Yates in 1979. A Memorandum Of Understanding was signed for a one year period for the first year of joint operation in 1979 and was not signed thereafter. The joint mission was to see if the two agencies could have any sort of collaborative program. The services were twofold. IHS's initial purpose was to look at the establishment of a brick and mortar building that would be an in-patient treatment facility for handicapped Indian children and to provide an interagency multidisciplinary team that would provide on site services to suspected and or handicapped Indian children. The Bureau's purpose, on the other hand, was based on a "state plan" that was submitted to Bureau for Education of the Handicapped in 1976, 1977, 1978. The Bureau agreed with IHS to join in the expansion of the ICP to include educational types of staff. For the First year the program was limited to the southwest region for direct services and assisted BIA schools in the

southwest region in meeting compliance standards for P.L. 94-142. BIA services under the ICP were intended to be secondary to the primary P.L. 94-142 services of BIA schools. Co-equal emphasis was to be given to the health as well as the educational needs of the referred Indian children. Medical, educational, diagnostics and treatment planning services were to be provided through the ICP project through existing local service providers under contract or through direct services provided or arranged by IHS or BIA as appropriate, consistent with the concept of providing services to handicapped Indian children in the least restrictive environment.

2. State the date the BIA became involved with the ICP and describe in detail the extent of that involvement.

ANSWER: The BIA became involved with ICP in July 1979 when Ann Leigh was designated as Codirector of the ICP project. BIA's involvement was to supplement the IHS's existing ICP with educational staff by providing diagnostic and treatment planning services for handicapped Indian children and parent and/or staff training in the implementation of these treatment plans.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted in Printing)

DEFENDANTS' RESPONSE TO PLAINTIFFS' SECOND REQUEST FOR ADMISSIONS

The Federal Defendants submit the following answers to plaintiff's second request for admissions:

* * * * *

129. The IHS decision to reduce or terminate ICP services provided directly to handicapped children was not based on the availability of alternative community resources or other local resources.

RESPONSE: Deny.

130. Prior to October of 1985 there was no direct reduction in the operating budget of the ICP.

RESPONSE: Admit.

131. The IHS decision to reduce or terminate ICP services provided directly to handicapped children in the southwestern region was not the direct result of a cut in the ICP budget.

RESPONSE: Admit.

132. The ICP employed an interdisciplinary team within which were represented the following disciplines: clinical psychology, developmental pediatrics, developmental psychology, child psychiatry, educational diagnostics, speech/language therapy, occupational therapy, physical therapy, vocational rehabilitation, therapy, recreational/art therapy, social work.

RESPONSE: Admit.

133. A major priority of the ICP was the long-term treatment planning and follow-up of individual clients.

RESPONSE: Deny except to admit that long term treatment planning and follow-up of individual clients became an ICP staff priority as the program developed after 1980.

134. Many of the children seen by the ICP suffered chronic problems which require long-term involvement.

RESPONSE: Admit.

135. Early detection and intervention services for handicapped children are crucial.

RESPONSE: Admit.

136. Without early detection and intervention services for handicapped children, many pre-school children will be further handicapped by the time they reach school programs for the handicapped.

RESPONSE: Admit.

137. The BIA did not provide written notice to the parents or guardians of the children for whom ICP services were terminated or whose ICP cases were closed out on or after October 1, 1985.

RESPONSE: Admit that the BIA did not provide written notice to the parents or guardians of the handicapped Indian children who were not enrolled in BIA schools for which ICP services were terminated or whose ICP cases were closed out on or after October 1, 1985.

138. The IHS did not provide written notice to the parents or guardians of the children for whom ICP services were terminated or whose ICP cases were closed out on or after October 1, 1985.

RESPONSE: Admit.

139. The ICP staff made a conscious decision not to provide written notice to the parents or guardians of children for whom ICP services were terminated or whose ICP cases were closed out on or after October 1, 1985.

RESPONSE: Deny except to admit that ICP staff notified referral sources who had the responsibility to notify parents.

140. The ICP no longer exists.

RESPONSE: Deny except to admit that the ICP as it existed in 1985 no longer exists.

141. The IHS failed to ensure that the decision to terminate ICP services provided directly to children in the southwestern region was available for public inspection and copying.

RESPONSE: Deny.

142. The IHS failed to publish any notice in the Federal Register in connection with the proposed or final decision to redirect the ICP or to reduce or terminate the ICP services provided directly to children in the southwestern region.

RESPONSE: Admit.

143. The IHS failed to advertise or otherwise attempt to hire persons to fill any of the positions vacated by ICP staff in 1985 or 1986.

RESPONSE: Deny.

144. ICP services were available to children from birth through twenty-one years of age who had or were suspected of having, or were at risk of having a physical, mental, emotional handicap or combination of handicaps and who were eligible for services from the IHS or the BIA.

RESPONSE: Deny except to admit that this describes the population eligible for ICP services during the time the ICP was a joint IHS/BIA pilot project. Thereafter, BIA continued to serve only those handicapped Indian children who were enrolled in BIA schools.

145. ICP services were available to eligible clients regardless of severity of handicap.

RESPONSE: Admit.

Dated: October 9, 1987

/s/ Duke McCloud
DUKE MCCLOUD
Senior Attorney
Public Health Division
Attorney for Federal Defendants

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No. 91-1833 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1992

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, ET AL., PETITIONERS

v.

GROVER VIGIL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that statements made in congressional committee reports and hearings on lump-sum appropriations bills, together with general notions of the federal "trust" responsibility for Indians, constitute "law to apply" for purposes of judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, of agency action affecting Indians.

2. Whether the court of appeals erred in holding that an agency's decision to reallocate funds and personnel from a discretionary pilot project providing certain health-related services for Indians in order to provide other health-related services for Indians constitutes a rule subject to the notice-and-comment requirements of the APA, 5 U.S.C. 553.

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In the Supreme Court of the United States

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 953 F.2d 1225. The opinions of the district court (Pet. App. 17a-45a, 46a-56a) are reported at 746 F. Supp. 1471.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1992. On April 3, 1992, Justice White extended the time for filing a petition for a writ of certiorari to and including May 14, 1992, and the petition was filed on that day. It was granted on October 5, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Snyder Act, 25 U.S.C. 13; the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1601 *et seq.*; the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*; and the appropriations acts for the Indian Health Service for fiscal years 1980 and 1985, Act of Nov. 27, 1979, Pub. L. No. 96-126, Tit. II, 93 Stat. 954, 973-974, and Act of Oct. 12, 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1837, 1863-1865, are reproduced at Pet. App. 57a-73a.

STATEMENT

1. The Indian Health Service (IHS) is an agency within the Public Health Service of the Department of Health and Human Services. The IHS provides a wide range of health services for approximately 1.5 million American Indian and Alaska Native people. IHS services are delivered through more than 500 direct health-care delivery facilities, including 50 hospitals, 158 health centers, 7 school health centers, and approximately 300 health stations and satellite clinics and Alaska village clinics. *Department of the Interior and Related Agencies Appropriations Bill, 1993*, H.R. Rep. No. 626, 102d Cong., 2d Sess. 101-102 (1992). The IHS has approximately 12,000 employees, 15 *Fiscal Year 1993 Justifications of Appropriation Estimates for Committee on Appropriations*, at IHS-26, and currently operates under lump-sum appropriations by Congress that make available more than $1.5 billion for operating expenses and more than $336,000,000 for capital expenses for fiscal year 1993. See Pub. L. No. 102-381, 106 Stat. 1407-1409.

The IHS allocates and spends its appropriated funds under the authority of the Snyder Act, 25 U.S.C. 13, and the Indian Health Care Improvement Act (IHCIA), 25

U.S.C. 1601 *et seq.* The Snyder Act provides in relevant part that the agencies responsible for Indian Affairs "shall direct, supervise, and expend such moneys as Congress may * * * appropriate, for the benefit, care, and assistance of the Indians * * * for the * * * relief of distress and conservation of health." 25 U.S.C. 13.[1] Title II of the IHCIA authorizes supplemental appropriations in a number of broad health-related areas, including patient care, field health (preventive, environmental and public health), and mental health. 25 U.S.C. 1621.[2]

The IHS has adopted general regulations implementing its authority to provide health services to Indians. Those regulations state that "[t]he services provided to any particular Indian community will depend upon the facilities and services available from sources other than the [IHS] and the financial and personnel resources made available to the [IHS]." 42 C.F.R. 36.11(c);[3] see also 42 C.F.R.

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[1] The Snyder Act applies by its terms only to the Bureau of Indian Affairs (BIA), an agency within the Department of the Interior. The Indian Hospitals and Health Facilities Act, 42 U.S.C. 2001, transferred responsibility for Indian health from the BIA to the Department of Health and Human Services.

[2] Title II authorizations were initially for three fiscal years (FY 1978 to FY 1980). The authorizations were extended by the Indian Health Care Amendments of 1980, Pub. L. No. 96-537, § 4, 94 Stat. 3174, through fiscal year 1984. Between 1984 and 1988, the IHCIA lapsed, but it was amended and reauthorized in 1988 by Pub. L. No. 100-713, Tit. II, § 201(a), 102 Stat. 4800, and in 1992 by Pub. L. No. 102-573, 106 Stat. 4526.

[3] The regulations provide:

> (a) Type of services that may be available. Services for the Indian community served by the local facilities and program may include hospital and medical care, dental care, public health nursing and preventive care including immunizations, and health examination of special groups such as school children.
>
> (b) Where services are available. Available services will be provided at hospitals and clinics of the Service and at contract

36.12(a) (1986) (services will be provided to qualified persons of Indian or Alaska Native descent "to the extent that funds and resources allocated to the particular Health Service Delivery Area permit").[4]

Title II of the IHCIA authorized spending for "therapeutic and residential treatment centers." 25 U.S.C. 1621(a)(4)(D). As the report of the House of Representatives committee explained, one of the purposes of that provision was to authorize funds "to establish therapeutic and residential treatment centers for disturbed Indian children to provide these children with intensive care in a residential setting * * *. The plan is to develop a major cooperative care agreement between the IHS and the BIA using suitable BIA facilities in convenient locations." H.R. Rep. No. 1026, 94th Cong., 2d Sess. 80-81 (1976); see Pet. App. 4a.

Congress never appropriated funds expressly designated for the centers mentioned in 25 U.S.C. 1621(a)(4)(D). But in 1978, the IHS allocated approximately $292,000 from

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facilities (including tribal facilities under contract with the Service).

(c) Determination of what services are available. The Service does not provide the same health services in each area served. The services provided to any particular Indian community will depend upon the facilities and services available from sources other than the Service and the financial and personnel resources made available to the Service.

42 C.F.R. 36.11.

[4] Since 1988, Congress has suspended new eligibility regulations that had been promulgated on September 15, 1987, see 52 Fed. Reg. 35,049, to replace the eligibility requirements previously codified at 42 C.F.R. 36.12. See, *e.g.*, Pub. L. No. 100-713, § 719(a), 102 Stat. 4838. Accordingly, the currently applicable eligibility requirements can be found in the 1986 Code of Federal Regulations. Both the new and old requirements are identical in respects pertinent to the issues in this case and both include the language quoted in text.

its fiscal year 1978 appropriation to the IHS headquarters mental health branch in Albuquerque, New Mexico, for development of a pilot program for handicapped Indian children. Pet. App. 4a-5a. That program came to be known as the Indian Children's Program (ICP). Although the House committee report had envisioned "centers" located in BIA "facilities," the ICP originated in part as an effort to assess the need for a single treatment and diagnostic center for handicapped Indian children. Pet. App. 5a; *Department of the Interior and Related Agencies Appropriations for 1980: Hearings Before the House Subcomm. on the Department of the Interior of the House Comm. on Appropriations,* 96th Cong., 1st Sess. Pt. 8, at 245-252 (1979).

In 1979, the IHS included $3.5 million for a treatment and diagnostic center in its budget request for fiscal year 1980. The appropriations act for 1980 did not specify that funds in that or any other amount were to be made available for such a center, see Pet. App. 67a-69a, but the relevant committee reports did state that Congress had provided an increase of $300,000 in total funding for Indian health services in order to permit the expansion of the pilot handicapped children's program into a "nationwide" effort.[5]

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[5] The House Report stated:

[T]he Committee has provided an increase of $300,000 for expansion of the handicapped children's program. The funds will be used to provide diagnostic service to children with complex problems who reside nationwide and who require a sophisticated medical treatment for their disorders.

H.R. Rep. No. 374, 96 Cong., 1st Sess. 82-83 (1979).

The Senate Report expressed approval of the budget increase:

The Committee concurs in the House increases of * * * $300,000 to widen diagnostic, health and education services for handi-

In the fall of 1979, after a meeting with the IHS and Representative Sidney Yates, at that time chairman of the Interior and Related Agencies Subcommittee of the House Appropriations Committee, the BIA agreed to participate in the ICP and allocated $350,000 from the BIA's budget to support and supplement the existing IHS program. J.A. 28-29. In February 1980, the BIA and IHS entered into a memorandum of agreement to join in an "Indian Child Study Project." The memorandum provided that the pilot project was to "enable both BIA and IHS to assess the need for a multi-disciplinary medical/education complex to provide services to handicapped Indian children" and "designed to expand outreach services currently provided by the IHS-Indian Children's Program (ICP)." J.A. 38.

Despite the initial intentions, no "center" or "complex" for handicapped Indian children was ever established. Instead, as it ultimately evolved, the ICP employed between 11 and 16 IHS staff members to provide monitoring and assessment services for handicapped Indian children. The personnel were based in Albuquerque, and the ICP remained a regional pilot project serving reservation communities in New Mexico, Southern Colorado, and the Navajo and Hopi Reservations. J.A. 65, 80, 89. Staff members visited reservation communities about once a month. The services they provided included identification and diagnosis of mentally handicapped children,

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capped children. The current handicapped program, budgeted at $292,000, is little more than a consulting service for the Albuquerque, N. Mex., area. Under a cooperative agreement with the Bureau of Indian Affairs, which is to provide facilities, transportation, and educational services, the program should expand to one offering short-term residential care and referral services better designed to meet the health and education needs of Indian children from all areas of the Nation.

S. Rep. No. 363, 96 Cong., 1st Sess. 91 (1979).

development and monitoring of their treatment plans, "consultative visits" in the children's home communities, and training. Pet. App. 12a, 19a. The ICP personnel generally did not serve as primary furnishers of rehabilitative and other services to the children. J.A. 94. Rather, because staff members visited communities no more than once a month, the children they monitored had to seek primary therapy from whatever sources were available to them at local IHS facilities, at their schools, or from other providers, such as Medicaid and state health programs. J.A. 91-92, 94.

Congress never mentioned the ICP in legislation, and the IHS funded the ICP out of annual lump-sum appropriations throughout the period from 1980 to 1985. Pet. App. 6a, 11a-13a. A 1981 IHS review of the ICP criticized the local nature of the program and its lack of communication with other IHS programs. J.A. 72-73. That review, conducted by Dr. Robert Kreuzberg, then the IHS maternal and child health coordinator, emphasized the need for a national program more fully integrated with other IHS children's programs. *Ibid.* Dr. Kreuzberg expressed concern that the ICP, which was under the auspices of the IHS headquarters, was "politically and clinically" closely tied to the Albuquerque area and that the staff remained "autonomous" from the rest of the IHS system. *Ibid.*

By 1985, IHS management had decided that the staff efforts then being devoted to the ICP could be more effectively utilized within the IHS system if they were devoted instead to providing technical assistance and consulting services to all IHS areas and service units on a nationwide basis, as Congress had originally intended. Pet. App. 2a, 20a; see note 5, *supra*. Accordingly, the IHS decided to terminate the more narrowly focused ICP and to reallocate its resources to a nationwide effort. See Pet. App.

2a. In a memorandum dated August 21, 1985, the acting ICP clinical and administrative directors informed the IHS Area Offices, IHS service units, and all referral sources, that patient consultative services would be discontinued. J.A. 77-78; see also J.A. 80-81.[6]

2. Subsequently, respondents brought this class action in the United States District Court for the District of New Mexico seeking declaratory and injunctive relief. Respondents alleged that the termination of services offered to handicapped children through the ICP violated, *inter alia*, the "federal trust responsibility to Indians, the Administrative Procedure Act (APA), * * * the Snyder Act, * * * the Indian Health Care Improvement Act, * * * various agency rules and regulations, and their Fifth Amendment due process rights." Pet. App. 2a-3a. By order dated June 22, 1987, the district court certified a stipulated plaintiff class consisting of:

> all handicapped Indian children who in the past received, or who presently are, have been, or will be eligible to receive health services from the Indian Health Service in the Albuquerque Area, Navajo Area, and Hopi reservation portion of the Phoenix Area, including health services formerly available through the Indian Children's Program.

Pet. App. 21a.

On July 6, 1990, the district court granted summary judgment for respondents. Pet. App. 17a-45a. The court

[6] As of August 1985, the staff was following 426 children. Pet. App. 20a. The staff conducted concluding consultations with parents, professionals, and others concerned with each of those children. J.A. 84-86. The BIA continues to follow handicapped children in the ICP service area (and elsewhere) pursuant to its responsibilities under the Education for All Handicapped Children's Act (EAHCA), 20 U.S.C. 1400 *et seq.* The BIA has promulgated regulations recognizing that duty. See 25 C.F.R. 45.1.

held that the IHS's decision to terminate the ICP and reallocate its resources to a nationwide effort to ensure the availability of services to all handicapped Indian children was not "committed to agency discretion by law" within the meaning of 5 U.S.C. 701(a)(2). The court believed that the statutes involved, although broadly worded—together with Congress's awareness of the ICP when it made lump-sum appropriations for the IHS—provided "ample" law to permit a court to assess the IHS's action. Pet. App. 30a. The court held that the action was thus judicially reviewable.

The court further held that the decision to terminate the ICP constituted administrative rulemaking, reasoning that the APA "broadly defines an agency rule to include nearly every statement an agency may make." Pet. App. 38a (quoting *Batterton* v. *Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980)). The court rejected petitioners' argument that the termination decision was exempt from the APA's notice-and-comment provisions in 5 U.S.C. 553 because it involved merely an "interpretative" rule or "general statement[ ] of policy." See 5 U.S.C. 553(b)(A). In the court's view, because the termination had significant effects on private interests, it was a "legislative rule" subject to the notice-and-comment requirement. Because the IHS had not published its decision to terminate the ICP for public comment, the court held that the IHS's decision was procedurally invalid. Pet. App. 38a-44a. After further briefing, the district court issued an additional memorandum opinion and order, directing the IHS to reinstate the program. *Id.* at 46a-56a. A restored ICP is currently in place.

3. The court of appeals affirmed. Pet. App. 1a-16a. It acknowledged that manageable standards for reviewing the IHS's decision to terminate the ICP were "difficult to find" in the Snyder Act and the IHCIA, observing that the ICP "appears to have been created at the discretion of the IHS" and that respondents had "not cited any statute or

regulation which even refers to the Project or provides specific standards for reviewing its termination." Pet. App. 10a-11a. But the court nonetheless held that there was sufficient "law to apply" to permit judicial review. Referring to congressional hearing testimony and committee reports accompanying the lump-sum appropriations that fund the IHS's overall operations, the court first concluded that Congress "was informed of" and "intended to fund" the ICP, "albeit through general appropriations." *Id.* at 13a. In addition, the court believed that the "special relationship" between the Indian people and the United States "suggests that the withdrawal of benefits from Indians merits special consideration." *Id.* at 13a, 14a (quoting *Vigil* v. *Andrus*, 667 F.2d 931, 936 (10th Cir. 1982)).[7] In the court's view, this "special consideration," coupled with "Congress' recurring budgeting recognition of the Project," provided "an appropriate backdrop for judicial review" to determine whether IHS's action "ultimately does redound to the 'benefit, care and assistance' of Indians." Pet. App. 14a-15a.[8]

The court of appeals also held that the IHS was required to follow notice-and-comment rulemaking procedures before reallocating funds from the ICP to the nationwide effort. The court believed that holding to be required by *Morton* v. *Ruiz*, 415 U.S. 199 (1974), which in the court's view

[7] This case and *Vigil* v. *Andrus* involve different plaintiffs.

[8] Both lower courts appeared to believe that a ruling on the availability of judicial review on the substance of the termination decision was a necessary predicate to a decision on the rulemaking issue, but that is not necessarily true. The rulemaking provision of the APA, 5 U.S.C. 553, may itself provide "law to apply" for reviewing agency procedures, even if there is otherwise no jurisdiction to review the substance of an agency decision. See *Story* v. *Marsh*, 732 F.2d 1375, 1381, 1384 (8th Cir. 1984) (finding "the substance of the agency action largely unreviewable," but stating that "[t]his is not to say * * * that the procedures followed by the [agency] * * * are likewise unreviewable," and proceeding to consider whether the agency failed to comply with notice-and-comment procedure).

stands for the broad proposition that "notice and comment procedures should be provided any time the government 'cuts back congressionally created and funded programs for Indians' even when the Indians have no entitlement to the benefits." Pet. App. 15a (citing *Vigil* v. *Andrus*, 667 F.2d at 936).

SUMMARY OF ARGUMENT

The court of appeals' reasoning fundamentally distorts both appropriations law and administrative law, and it is inconsistent with decisions of this Court and of the lower courts. The decision strips discretion from federal agencies in allocating agency resources and improperly draws federal courts into a managerial role that rests with the Executive Branch. In addition, the decision requires an agency to undertake notice-and-comment rulemaking whenever a contemplated action could have an adverse impact on Indians. The imposition of such procedures furthers no purpose except to delay the delivery of health care services to communities in need.

1. Agency action is committed to agency discretion by law in "those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971). The decision to reallocate funds from the ICP to other services on behalf of Indian children falls within that category. The ICP program was not mandated, specifically authorized, or even mentioned by any Act of Congress. Neither the Snyder Act, 25 U.S.C. 13, nor the IHCIA, 25 U.S.C. 1601 *et seq.*, provides standards by which to review the decision to terminate the ICP. Likewise, regulations promulgated by the IHS merely state that the "services provided * * * depend upon the facilities and services available," 42 C.F.R. 36.11(c), and thus provide no meaningful standard.

The court of appeals erred in finding "law to apply" outside the relevant statutes and regulations. The court believed that statements made during congressional hearings and in congressional committee reports could provide law to apply. Not so. The IHS is not legally bound by suggested funding allocations that do not find their way into a law duly enacted by Congress. Although Congress may direct the expenditure of funds for a specific purpose or mandate the creation of a specific program by enacting legislation that so provides, mere committee reports and hearing statements concerning lump-sum appropriations lack the legal authority of such legislation. Since those sources do not impose binding obligations on an administrative agency, they cannot serve as "law to apply" by a court in reviewing agency action.

Nor can general notions of the "federal trust responsibility to Indians" constitute law to apply for purposes of APA review. The "trust" responsibility to Indians is implicated only where Indian property is at stake, *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987), and the contours of any judicially enforceable trust relationship in that setting are supplied by statutes and regulations relevant to the property at issue. See *United States* v. *Mitchell*, 463 U.S. 206, 224 (1983). Funds allocated under the Snyder Act are gratuitous appropriations, not trust funds belonging to the Indians, and the United States therefore does not act as a fiduciary when it allocates those funds. *Scholder* v. *United States*, [illegible] F.2d 1123, 1128 (9th Cir.), cert. denied, 400 U.S. 942 (1970); *Quick Bear* v. *Leupp*, 210 U.S. 50, 80-81 (1908). Accordingly, the generalized notion of a federal "trust" responsibility to Indians neither imposes an obligation on the IHS to continue the regional ICP nor provides a meaningful standard by which a court can review the IHS's decision to expend its resources on other programs for the benefit of Indians instead of the ICP.

2. The court of appeals also erred in holding that the IHS's decision to discontinue the ICP was procedurally invalid because the IHS made that decision without employing notice-and-comment procedures applicable to rulemaking under the APA. In *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), this Court held that a decision to fund a highway project was not "rulemaking" under the APA. *Id.* at 414-415. That same reasoning applies to the IHS's decision not to continue funding the ICP as it was then constituted, and instead to devote its resources to a nationwide effort on behalf of handicapped Indian children. A contrary result would render each decision by the IHS and similar service-providing agencies to replace old equipment, alter the mix of services offered at each of its locations, or deploy its staff differently into a "rule" that could only be implemented after compliance with the APA.

In addition, the court of appeals' decision—by mandating notice-and-comment rulemaking whenever an agency cuts back on services for Indians—improperly imposes procedural requirements not dictated by statute, in violation of the principles this Court laid down in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978). In this case, neither the APA, the Snyder Act, or the IHCIA requires notice-and-comment rulemaking. Nor does the court of appeals' conclusion find any support in this Court's decision in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), which invalidated a rule of eligibility that an agency had failed to publish in accordance with its own, self-imposed requirements.

ARGUMENT

I. CONGRESSIONAL COMMITTEE REPORTS AND HEARINGS ON LUMP-SUM APPROPRIATIONS BILLS, TOGETHER WITH GENERAL NOTIONS OF A FEDERAL "TRUST" RESPONSIBILITY TO INDIANS, DO NOT CONSTITUTE "LAW TO APPLY" FOR PURPOSES OF JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

Although agency action is generally presumed to be reviewable, see *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967), the APA provides two exceptions to that principle: (1) where "statutes preclude judicial review," or (2) where "agency action is committed to agency discretion by law." 5 U.S.C. 701(a). This court has held that agency action is committed to agency discretion by law in "those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971). See also *Webster* v. *Doe*, 486 U.S. 592, 600 (1988); *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985) ("[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.")

Whether there is "law to apply" in a given case "requires careful examination of the statute on which the claim of agency illegality is based." *Doe*, 486 U.S. at 600. None of the statutes on which respondents rely provides any meaningful standard for judicial review of the decision by the IHS to devote to other purposes the resources it previously had spent on the ICP.

The Snyder Act simply authorizes the IHS and the BIA to expend whatever funds Congress may appropriate for the "benefit, care, and assistance" of Indians in a number of broad subject areas, including the "relief of distress and

conservation of health" of Indians. 25 U.S.C. 13. The Snyder Act does not require funds to be spent for any particular purpose; nor does it prescribe specific criteria to be followed by the IHS or BIA in allocating resources among their various programs for the "benefit, care, and assistance" of Indians.[9] In short, the Snyder Act imposes no obligation on the IHS or BIA to expend funds on one or the other of numerous programs that could come within the general "benefit, care, and assistance" standard, and it provides no judicially manageable standard for judging whether the decision to expend funds on a particular program was proper. Cf. *Scholder* v. *United States*, 428 F.2d at 1128 (rejecting contention that Snyder Act "present[s] federal courts with the unenviable task of reviewing individual [BIA] expenditures and speculating in each instance about [who are the] potential beneficiaries").

Likewise, the IHCIA provides no law to apply. The IHCIA supplements IHS's broad discretionary authority under the Snyder Act to expend appropriated funds on Indian health. Title II of the IHCIA authorizes supplemental appropriations over several years in the broad categories of (1) patient care (operation of IHS hospitals, health centers and clinics); (2) field health (preventive, environmental and public health); (3) dental care; (4) mental health; (5) alcoholism; and (6) maintenance and repair of

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[9] As this Court explained in *Morton* v. *Ruiz*, 415 U.S. 199, 205-206 (1974), the Snyder Act was comprehensively worded to provide the BIA with broad authority to expend funds to assist Indians, and thus to avoid point-of-order objections on the floor of the House or Senate to Indian assistance appropriations. This purpose of ensuring a broad range of flexibility in funding services for the benefit of Indians refutes the court of appeals' notion that the Snyder Act furnishes a basis for courts to entertain objections by private parties to the allocation of funds appropriated pursuant to that Act.

IHS facilities. 25 U.S.C. 1621. The IHCIA nowhere discusses the ICP or requires the IHS to spend any appropriated funds on the ICP. And the IHCIA's broad statements of purpose, like those in the Snyder Act, provide no standard for appraising whether the IHS should have continued to fund the ICP.

Not surprisingly—in view of the complete lack of reference to the ICP in the Snyder Act or the IHCIA—the court of appeals did not view either statute alone as furnishing "law to apply." Pet. App. 10a. To the contrary, the court conceded that "specific manageable standards for reviewing the funding termination are difficult to find in the Snyder Act * * * and the IHCIA." *Ibid.*[10] The court further observed that respondents had "not cited any statute or regulation which even refers to the Project or provides specific standards for reviewing its termination." Pet. App. 11a.[11] Thus, the court of appeals looked elsewhere for manageable standards of review. It ultimately settled on what it regarded as congressional recognition of the ICP, as reflected in committee reports and hearing

[10] Notwithstanding the fact that the respondents had not even alleged a violation of the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. 1400 *et seq.*, in their complaint, see J.A. 4-19, the district court suggested that that Act also provided law to apply. Pet. App. 30a. The court of appeals, however, encountered the same difficulty in finding "specific manageable standards" for judicial review in the EAHCA that it had found in the Snyder Act and the IHCIA. Pet. App. 10a. As noted above, see note 6, *supra*, the BIA—but not the IHS—has statutory responsibilities under the EAHCA.

[11] Cf. *Webster* v. *Doe*, 486 U.S. at 602 n. 7; *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260, 267 (1954); *United States* v. *Nixon*, 418 U.S. 683, 695-696 (1974); *Center for Auto Safety* v. *Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988); see also *Greater Los Angeles Council on Deafness, Inc.* v. *Baldridge*, 827 F.2d 1353, 1361 (9th Cir. 1987).

testimony, coupled with the "special relationship" between Indian people and the United States. Pet. App. 13a. Neither of those sources, however, provides law that a court may apply in reviewing the IHS's decision to allocate appropriated funds to purposes other than the ICP.

A. NEITHER STATEMENTS MADE DURING CONGRESSIONAL HEARINGS NOR CONGRESSIONAL COMMITTEE REPORTS PROVIDE LAW TO APPLY

In relying on precatory statements made in congressional committee reports and discussions during congressional hearings as "law to apply," the court of appeals elevated those statements to the level of binding law, in direct disregard of this Court's admonition that such unenacted materials do not have the "force of law." *American Hospital Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1545 (1991). See also *United States* v. *R.L.C.*, 112 S. Ct. 1329, 1342 (1992) (Thomas, J., concurring in part and in the judgment) ("committee reports and floor statements * * * are not law"). That principle carries special force in the appropriations context, where, given the limited purpose of appropriations measures to provide funds for authorized programs, it is especially clear that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress." *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 191 (1978).

This is not an instance of looking to committee reports or testimony in congressional hearings as a guide to resolving particular ambiguities in the text of an Act of Congress. The appropriations acts at issue here are written in the broad and general terms typical of such enactments; they make money available for "expenses necessary to carry out" the IHS's functions under its various authorizing statutes, and they contain no language that could even remotely be "construed" to refer to—much less require

funding for—specific services such as those furnished under the ICP. Rather, the courts below relied on statements in committee reports and hearing testimony as a *substitute* for statutory text. However, "the Constitution is quite explicit about the procedure that Congress must follow in legislating," *American Hospital Ass'n*, 111 S. Ct. at 1545, and committee hearings and reports are not the end product of that procedure. Cf. *INS* v. *Chadha*, 462 U.S. 919 (1983). See *American Hospital Assn*, 111 S. Ct. at 1546 (citing *Public Employees Retirement System of Ohio* v. *Betts*, 492 U.S. 158, 168 (1989) ("legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight" even "in judicial interpretation of the statute" itself)).

In *International Union, UAW* v. *Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 474 U.S. 825 (1985), the District of Columbia Circuit expressly rejected the suggestion that legislative history could provide "law to apply" permitting judicial review of an agency's allocation of a lump-sum appropriation among various programs:

> [L]egislative history is relevant to our inquiry—but not directly relevant. As the Supreme Court has said (in a case involving precisely the issue of Executive compliance with appropriation laws, although the principle is one of general applicability): "legislative intention, without more, is not legislation." *Train* v. *City of New York*, 420 U.S. 35, 45 * * * (1975). The issue here is not how Congress expected or intended the Secretary to behave, but how it *required* him to behave, through the only means by which it can (as far as the courts are concerned, at least) require anything—the enactment of legislation. Our focus, in other words, must be on the text of the appropriation.

746 F.2d at 860-861.[12]

The Comptroller General, whose "accumulated experience and expertise" in the field of government appropriations gives special weight to his opinions, see *International Union*, 746 F.2d at 861 (citing *M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289, 1305 (D.C. Cir. 1971)), has reached the same conclusion. In response to a claim that a contract had been awarded in violation of sentiments expressed in a congressional committee report, the Comptroller General explained that "there is a clear distinction between the imposition of statutory restrictions or conditions which are intended to be legally binding and the technique of specifying restrictions or conditions in a non-statutory context." *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 318 (1975).[13] When "Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements

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[12] See also *United States* v. *Board of Education of the City of Chicago*, 621 F. Supp. 1296, 1393 (N.D. Ill. 1985) (the Secretary of Education "is not legally bound by program allocations or budgetary estimates not incorporated into the language of an appropriation act itself"), vacated on other grounds, 799 F.2d 281 (1986).

[13] Indeed, Congress has included legally binding restrictions on the IHS's expenditure of lump-sum appropriations, but none of them have mentioned the ICP or required the IHS to continue to fund the ICP. For example, the 1979 appropriation included a proviso "[t]hat funds made available to tribes and tribal organizations through grants and contracts authorized by the Indian Self-Determination and Education Assistance Act of 1975 * * * shall remain available until September 30, 1981." Pub. L. No. 96-126, Tit. II, 93 Stat. 954, 973, *reprinted in* Pet. App. 67a. For other examples, see Pet. App. 69a-73a.

on Federal agencies." *Id.* at 319. As the Comptroller General explained, "when Congress does not intend to permit agency flexibility, but intends to impose a legally binding restriction on the agency's use of funds, it does so by means of explicit statutory language." *Id.* at 318; see also *In re Financial Assistance to Intervenors,* 59 Comp. Gen. 228, 231 (1980); United States General Accounting Office, *Principles of Federal Appropriations Law* 5-94 to 5-103 (1982).

To be sure, agencies like the IHS routinely provide Congress with considerable detail on programs and expenditures when they submit justifications for appropriations requests. For example, in 1983 hearings before a House appropriations subcommittee, relied upon by the court of appeals, Pet. App. 11a-12a, the IHS submitted a document discussing not only the ICP, but also specific clinics and hospitals, repairs to facilities, staff housing problems, and alcoholism and urban health projects. See *Department of the Interior and Related Agencies Appropriations for 1984: Hearings Before a Subcomm. of the House Comm. on Appropriations,* 98th Cong., 1st Sess. Pt. 3, at 331-418 (1983). That explanation of the agency's programs was intended to make "for better relations with Congress (the appropriations committees)," and "thereby facilitate[ ] the process of obtaining replacement appropriations." *Blackhawk Heating & Plumbing Co.* v. *United States,* 622 F.2d 539, 547 (Cl. Ct. 1980). It did not convert a lump-sum appropriation into an itemized listing of specific programs and services that IHS was required to continue to provide.

Likewise, it is not unusual for congressional committee members to attempt to influence the expenditure of general appropriations by way of statements in committee reports. See M. Kirst, *Government Without Passing Laws: Congress' Nonstatutory Techniques for Appropriations Control* 30-39 (1969). In this way, members of Congress hope to constrain the exercise of agency discretion through "extra-legal" methods. The force of those directives is, however, political, not legal. Executive officials "ignore such expressions of intent at the peril of strained relations with the Congress," *LTV Aerospace Corp.,* 55 Comp. Gen. at 325-326, not intervention by the courts. See *American Hospital Ass'n,* 111 S. Ct. at 1545-1546 ("the remedy for noncompliance with the admonition [in a congressional committee report] is in the hands of the body that issued it").

In sum, to be legally binding, congressional intent must be embodied in legislative language enacted by both Houses of Congress and signed by the President, as the Constitution requires. *INS* v. *Chadha,* 462 U.S. 919 (1983). The materials on which the court of appeals relied as evidence of congressional intent here did not undergo that process and therefore cannot constitute "*law* to apply" by a court in reviewing the IHS's action in this case. *Citizens to Preserve Overton Park,* 401 U.S. at 410 (emphasis added).

B. THE FEDERAL "TRUST" REPONSIBILITY TO INDIANS PROVIDES NO LAW TO APPLY IN THIS SETTING

The court of appeals did not rest its reviewability holding exclusively on the snippets of legislative history of the IHS's lump-sum appropriations acts. The court also relied (Pet. App. 13a-15a) on its view of a "special relationship" between the federal government and the Indian people (which it variously termed a "guardian-ward," "trust," or "fiduciary" relationship, see Pet. App. 14a, 15a n.7). The court held that the United States owes a general duty of "fairness" to Indian peoples that imposes substantive constraints on the discretion of the Executive

Branch even in the absence of any Indian property interests or other vested rights—and even in the absence of any statute in which Congress has embodied such a duty in judicially enforceable standards. In whatever terms it may be described, however, the "special relationship" between the federal government and the Indians does not provide "law to apply" in this case.

"It is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987). That federal responsibility, however, "do[es] not create property rights where none would otherwise exist but rather presuppose[s] that the United States has interfered with existing tribal property interests." *Ibid.* In this case, no Indian property rights are at stake.[14] Funds made available pursuant to the authorization in the Snyder Act or the IHCIA are gratuitous appropriations, not trust funds belonging to the Indians. *Scholder* v. *United States*, 428 F.2d 1123, 1129 (9th Cir.), cert. denied, 400 U.S. 942 (1970); *Quick Bear* v. *Leupp*, 210 U.S. 50, 80-81 (1908) (monies appropriated for support of Indian schools are gratuitous appropriations, but monies appropriated to fulfill treaty obligations are "trust" funds and may be used to pay for the education

[14] Indeed, even where Indian property rights *are* implicated, the term "trust" may be something of a misnomer. "[T]he fiduciary relationship springs from the statutes and regulations which 'define the contours of the United States' fiduciary responsibilities.' " *Pawnee* v. *United States*, 830 F.2d 187, 192 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1988), (quoting *United States* v. *Mitchell*, 463 U.S. 206, 224 (1983)). Thus, where the federal government has fully complied with all applicable statutes, treaties, regulations, and contractual provisions in dealing with Indian property interests, no claim for breach of "trust" can be stated. *Pawnee*, 830 F.2d at 192; cf. *Nevada* v. *United States*, 463 U.S. 110, 128, 142 (1983).

of Indian pupils in sectarian schools). Cf. *United States* v. *Dann*, 470 U.S. 39, 49-50 (1985). In distributing such funds, "[t]he United States acts in no more a fiduciary capacity * * * than it does in distributing *any* funds appropriated by Congress." *James* v. *Department of Health & Human Servs.*, 12 Indian L. Rep. (Am. Indian Law Training Program) 3097, 3100 (D.D.C. Aug. 14, 1985).

The court of appeals thus fundamentally misapprehended the nature of the "special relationship." The responsibility for articulating, giving content to, and implementing the "special relationship" between the United States and Indians and Indian Tribes lies with Congress, U.S. Const. Art. I, § 8, Cl. 3 (Indian Commerce Clause); *United States* v. *Kagama*, 118 U.S. 375, 383-384 (1886), or with the President and the Senate in making treaties, not with the courts. In the setting of this case, Congress has chosen to implement *its* view of the special relationship between the United States and Indians by enacting the Snyder Act and IHCIA (and annual appropriations under those Acts) and conferring on the IHS and the BIA broad discretion and flexibility to determine how best to provide services to Indians, including the "relief of distress and conservation of health." Because Congress declined to create vested rights in any particular programs or services provided under the auspices of the Snyder Act and the IHCIA—or to specify particular standards that must be followed by the IHS and BIA in allocating funds—there are no judicially enforceable standards that remove the IHS's action at issue here from the category of those "committed to agency discretion by law." 5 U.S.C. 701(a) (2). The notion of a "special relationship" between the United States and the Indians possesses no *independent* legal force that would furnish a basis for judicial review of discretionary agency decisions concerning the allocation

of appropriated funds, where Congress itself has declined to impose limits on the exercise of that discretion.

Indeed, although the court of appeals concluded that a "duty of fairness," coupled with the Snyder Act's general provision "for the relief of distress and conservation of health," 25 U.S.C. 13, provided a basis for judicial review, Pet. App. 14a-15a, the court did not even attempt to employ its notion of law to apply in evaluating the IHS's funding reallocation at issue here. And any such attempt would be an exercise in futility. The IHS terminated the ICP so that it could utilize the available funds and resources in a manner that would advance the health of handicapped Indian children nationwide, rather than solely in the Southwest. What is a "fair" allocation of scarce public funds in such circumstances is a judgment that a court is simply not equipped to make. Cf. *Hoopa Valley Tribe* v. *Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986) (holding that there is no federal trust responsibility that can be discharged to the benefit of some Indians but at the expense of others).

In sum, the extra-statutory and unanchored "trust" principle of judicial review announced by the court of appeals has an almost limitless potential for justifying judicial second-guessing of Executive Branch decision-making affecting Indians. It finds no support in this Court's cases, and it has been rejected by the other lower federal courts to address the issue. It should not be permitted to stand in this case.

C. IN THE ABSENCE OF LAW TO APPLY, THE DECISION TO END THE INDIAN CHILDREN'S PROJECT WAS COMMITTED TO AGENCY DISCRETION

That there should be no law to apply to the agency decision at issue in this case is hardly surprising. Courts, including the Tenth Circuit, have observed that agency

funding decisions are "notoriously unsuitable for judicial review, for they involve the inherently subjective weighing of the large number of varied priorities which combine to dictate the wisest dissemination of an agency's limited budget." *Community Action of Laramie County, Inc.* v. *Bowen*, 866 F.2d 347, 354 (10th Cir. 1989) (citing *Alan Guttmacher Inst.* v. *McPherson*, 597 F. Supp. 1530, 1536-1537 (S.D.N.Y. 1984)), aff'd as modified, 805 F.2d 1088 (2d Cir. 1986)); *California Human Development Corp* v. *Brock*, 762 F.2d 1044, 1052 (D.C. Cir. 1985) (Scalia, J., concurring) ("allocation of * * * funds among various eligible recipients, none of which has any statutory entitlement to them, is traditionally a matter 'committed to agency discretion by law' "); compare *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985) (agency decisions not to enforce the law are committed to agency discretion because they involve "complicated balancing of a number of factors which are peculiarly within its expertise," including the allocation of scarce "agency resources" and "the proper ordering of its priorities"). That is particularly true where, as here, the agency's decision involves allocation of lump-sum appropriations, because such appropriations have long been understood to "leave[ ] it to the recipient agency (as a matter of law at least) to distribute the funds among some or all of the permissible objects as it sees fit." *International Union*, 746 F.2d at 861; compare *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987) (agency action unreviewable where matter has traditionally been regarded as committed to agency discretion); *Heckler* v. *Chaney*, 470 U.S. at 832 (same).

For the foregoing reasons, among others, the courts have long declined to review agency decisions involving the termination or reallocation of agencies services or

resources. See *National Federation of Federal Employees* v. *United States*, 905 F.2d 400, 405 (D.C. Cir. 1990) (decision to close military base);[15] *Armstrong* v. *United States*, 354 F.2d 648, 649 (9th Cir. 1965), cert. denied, 384 U.S. 946 (1966) (decision to close Navy repair facility); *Sergeant* v. *Fudge*, 238 F.2d 916, 917 (6th Cir. 1956), cert. denied, 353 U.S. 937 (1957) (decision to discontinue post office); *Los Angeles Customs & Freight Brokers Ass'n* v. *Johnson*, 277 F. Supp. 525, 532 (C.D. Ca. 1967) (decision to shift location of customs office).[16] The IHS action that respondents challenge here is, in principle, no different from the administrative decisions challenged in those cases.

[15] Cf. *Specter* v. *Garrett*, 971 F.2d 936 (3d Cir. 1992) (substance of President's decision to close military base not subject to judicial review), vacated on other grounds *sub nom. O'Keefe* v. *Specter*, No. 92-485 (Nov. 9, 1992).

[16] A wide variety of other agency resource allocation and economic decisions have also been held to be judicially unreviewable. See *Electricities of North Carolina, Inc.* v. *Southeastern Power Administration*, 774 F.2d 1262 (4th Cir. 1985) (allocation of power by power agency); *Greenwood Utilities Comm'n* v. *Hodel*, 764 F.2d 1459 (11th Cir. 1985) (same); *City of Santa Clara* v. *Andrus*, 572 F.2d 660, 668 (9th Cir.), cert. denied, 439 U.S. 859 (1978) (same); *State of Florida Department of Business Regulation* v. *U.S. Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985) (decision to acquire tract of land for Seminole Indians), cert. denied, 475 U.S. [illegible] (1986); *Strickland* v. *Morton*, 519 F.2d 467 (9th Cir. 1975) (agency judgment that public land was suitable for disposal); *Frakes* v. *Pierce*, 700 F.2d 501 (9th Cir. 1983) (Department of Housing and Urban Development rental determinations); *Grace Towers Tenants Ass'n* v. *Grace Housing Development Fund, Inc.*, 538 F.2d 491 (2d Cir. 1976) (same); *Harlib* v. *Lynn*, 511 F.2d 51 (7th Cir. 1975) (same); *People's Rights Organization* v. *Bethlehem Associates*, 356 F. Supp. 407 (E.D. Pa. 1973), aff'd without op., 487 F.2d 1395 (3d Cir. 1973) (same); *Hahn* v. *Gottlieb*, 430 F.2d 1243 (1st Cir. 1970) (same).

Indeed, in the instant case the agency's ability to exercise discretion is especially important because judicial review, if permitted, would threaten severe and "disruptive practical consequences." *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 456 (1979). The IHS operates the largest direct health care delivery system in the Department of Health and Human Services. It employs 12,000 people and delivers health care to more than 1.5 million Indians and Alaska Natives nationwide. See p. 2, *supra;* see also Roger Walke, *Federal Programs of Assistance to Native Americans*, S. Prt. No. 102-62, 102d Cong., 1st Sess. 140 (1991). Agency resources are often scarce, and many recipients, like respondents, are in rural and remote areas. To permit a court to second-guess the IHS's decisions concerning how it may best allocate its resources would simply result in delay and possible denial of health services to communities in dire need. Congress is, of course, free to impose standards on the IHS that could, in turn, give rise to judicial review of allocation decisions—and to the delay and disruption of the delivery of health care that might ensue. But Congress has not done so. As a result, the IHS funding and allocation decision at issue here is "committed to agency discretion by law," 5 U.S.C. 701(a) (2), and not subject to judicial review.[17]

[17] In *Webster* v. *Doe*, 486 U.S. at 604-605, where this Court found no law to apply to the respondent's APA claim, the case was remanded for consideration of the respondent's colorable constitutional claim. In the instant case, however, this Court need not remand because the consitutional claim advanced by respondents below is not colorable. In their complaint, respondents alleged that their Fifth Amendment due process rights were violated by the termination of the ICP. J.A. 15. In their district court pleadings, respondents elaborated

II. THE IHS DECISION TO TERMINATE THE PROJECT WAS NOT A "RULE" SUBJECT TO THE NOTICE AND COMMENT PROVISIONS OF THE APA, AND RULEMAKING IS NOT OTHERWISE REQUIRED BY THIS COURT'S DECISION IN *MORTON* V. *RUIZ*

Although both courts below held that there existed meaningful standards by which to judge the IHS decision to terminate the ICP, neither court examined the substance of the agency's decision. The district court held that the decision to terminate the ICP constituted legislative rulemaking subject to the notice-and-comment requirements of the APA, 5 U.S.C. 553. Pet. App. 35a-44a. Although the court of appeals also held that the ICP's decision to reallocate its resources was subject to notice-and-comment procedures, it did not rely on the APA in reaching that conclusion. Instead, the court of appeals relied on one of its own prior decisions that had interpreted this court's decision in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), to require notice-and-comment procedures whenever "the government 'cuts back congressionally created and funded programs for Indians' even when the

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on this allegation by explaining that they had a legal entitlement to the ICP that "stem[med] from the federal trust responsibility to provide services for Indian health care." Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Jurisdiction and In the Alternative for Summary Judgment, Record Entry 77, at 28. Neither the district court nor the court of appeals addressed that claim, but, as the foregoing discussion of the federal "trust" responsibility makes plain, any entitlement to services would have to be derived from a treaty, statute, or implementing regulations. Generalized notions of a "trust" responsibility to Indians cannot, in themselves, create a property right that would entitle respondents to a Fifth Amendment due process hearing. As we have explained, no such entitlement is created by the statutes or regulations at issue here.

Indians have no entitlement to the benefits." Pet. App. 15a (quoting *Vigil* v. *Andrus*, 667 F.2d. 931, 936 (10th Cir. 1982)). Both rationales for requiring notice and comment are mistaken.

A. THE DECISION TO TERMINATE THE PROJECT WAS NOT A "RULE"

1. An agency decision as to how to expend appropriated funds is not a "rule" subject to the notice-and-comment provisions of the APA. That conclusion is compelled by *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). *Overton Park* involved a challenge to an agency decision to expend federal funds to build a highway through a park. The plaintiffs challenged that decision on the ground that the Secretary of Transportation's antecedent determination that no "feasible and prudent" alternative route existed was improper. See 401 U.S. at 405. The plaintiffs argued that the Secretary's determination to spend the funds was the promulgation of a "rule" within the meaning of the APA, and that the APA's "substantial evidence" test accordingly should apply on judicial review of that determination.

This Court rejected the plaintiffs' argument. 401 U.S. at 414. It noted that the "substantial evidence" test "is authorized only when the agency action is taken pursuant to a rulemaking provision of the [APA]" (or in another circumstance not relevant here). *Ibid.* But, the Court held, "[t]he Secretary's decision to allow the expenditure of federal funds to build [the highway] through Overton Park was plainly not an exercise of a rulemaking function," and the substantial evidence test accordingly was "not applicable." *Ibid.*

The same principle governs this case. Under *Overton Park*, agency decisions concerning the discretionary allocation of funds for the provision of services are not subject to the procedural requirements that govern the promulgation of rules. In particular, the IHS's decision to stop funding the ICP as it had been constituted, and instead to expend its resources for the benefit of Indian children nationwide, was not the promulgation of a rule under the APA.

That conclusion is in accord with the language of the APA, as well as with long-standing considerations of administrative practice. The term "rule" is defined in the APA to mean:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. 551(4). Although that definition is broad, it is not unlimited, and it does not, contrary to the district court's view, "include nearly every statement an agency may make." Pet. App. 38a (quoting *Batterton* v. *Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980)). To the contrary, "[k]nowledgeable authorities in this field observed shortly after passage of the [APA] that certain types of agency action are neither rule making nor adjudication." *International Telephone & Telegraph Corp.* v. *Local 134*, 419 U.S. 428, 442 (1975) (quotation omitted). See also 2 K. Davis, *Administrative Law Treatise* § 8:1, at 158 (2d ed.

1979); W. Gardner, *The Procedures by Which Informal Action Is Taken*, 24 Admin. L. Rev. 155, 156 (1972). Among those actions are an agency's decisions concerning how to allocate its appropriated funds to accomplish its statutory functions.

As this Court recognized in *Overton Park*, decisions by an agency to spend (or not to spend) money for particular purposes do not constitute "rules." That is because the APA definition of "rule" is limited to "agency statement[s]" that have "future effect." See *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 217, 221 (1988) (Scalia, J. concurring) ("[A] rule is a statement that has legal consequences only for the future," and "deals with what the law will be."). The legislative history of the APA confirms this understanding. See S. Rep. No. 752, 79th Cong., 1st Sess. 11 (1945) (rules "formally prescribe a course of conduct for the future rather than merely pronounce existing rights or liabilities"); H.R. Rep. No. 1980, 79th cong., 2d Sess. 20 (1946) (same). Under that definition, an agency *action* does not become a rule merely because it has some future consequence. Rather, it is only when the agency action consists of a *statement* that has future effects that the action is a rule under the APA. And a statement—as opposed to an action—can be said to have a future effect only when it has an effect on the legal rights or obligations of individuals or of the agency itself, ordinarily by guiding the course of some future proceeding.[18]

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[18] The *Attorney General's Manual on the Administrative Procedure Act (1947)*, to which this Court has accorded deference "because of the role played by the Department of Justice in drafting the legislation," *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978), states that "[r]ule making is agency action which regulates the future conduct of either groups of persons or a single person." *Manual* at 14. The conclusion that the term "future effect" in the definition of "rule" means future *legal* ef-

In the case of an agency's decision concerning how to allocate its funds among its various statutory responsibilities, the agency's "statement" of that decision has no "effect" at all on the legal rights or obligations of any private individual, or even on any government employee. To be sure, the actual expenditure of the funds may well have a substantial impact on individuals. But the agency's *statement* has no independent future effect, because it will have no legal significance in any future proceeding, formal or informal, in which the rights or obligations of any individual are determined. Cf. *United States* v. *Cooper,* 699 F. Supp. 69, 74 (W.D. Pa. 1988) (list of placement sites for physicians who have received National Health Service Corps Scholarships is not a rule). Rather, an agency's decision concerning how to allocate its resources is entirely self-contained, and does not purport to bind or guide other decisions that may be made by the agency (or private parties) down the road. It therefore is not a "rule."

To conclude otherwise would be to hold that *all* agency action is rulemaking, because agencies ordinarily communicate their actions by using written or oral words and because all agency action has some impact in the future. For example, every time the IHS decides to replace (or not to replace) equipment at any of its 50 hospitals, to offer a

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fect is also confirmed by the ordinary meaning of the word "rule," which refers to a measure that has an abiding legal effect. See *Black's Law Dictionary* 1195 (5th ed. 1983) ("An established standard, guide, or regulation. A principle or regulation set up by authority, prescribing or directing action or forbearance; as, the rules of a legislative body, of a company, court, public office, or the law, of ethics. Precept attaching a definite detailed legal consequence to a definite detailed state of facts."); *Random House Dictionary of the English Language* 1680 (2d ed. 1987) ("a principle or regulation governing conduct, action, procedure, arrangement, etc."); *Webster's Third New International Dictionary* 1986 (1986) ("prescribed, suggested, or self-imposed guide for conduct or action; a regulation or principle").

new diagnostic test (or discontinue use of an old one) at any of its 158 health centers, or to shift staff among its 300 health stations and satellite clinics to meet current needs for health care, that conduct will have some consequences for individuals who use the equipment, make use of the diagnostic test, or were served by staff members whose duty station or job description is altered. Under respondents' theory, each of those actions would require publication in the Federal Register and—unless the action fell within one of the exceptions in 5 U.S.C. 553(a) or (b)[19]—full notice-and-comment procedures. Indeed, since the IHS would be required to undergo those procedures not only when it altered existing services, but also when it decided to offer new ones, the effect would be a substantial delay in the provision of needed health services to Indians.

Moreover, under respondents' theory that any agency action that has an impact in the future is a "rule" for purposes of the APA, the category of "rules" would not only encompass the long-recognized and distinct category of informal agency action, but would also swallow up the category of "orders" and thereby eliminate "adjudi-

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[19] The APA does not require notice-and-comment procedures for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," 5 U.S.C. 553 (b) (A), nor does it require such procedures for "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. 553 (a) (2). Although a number of those exceptions may be thought to apply to this case if the decision to terminate the ICP constituted a "rule," the government did not argue before the court of appeals that any of them applied. With respect to the exception for "a matter relating to • • • benefits," the Secretary did issue a memorandum in 1971 to all HHS (then-HEW) components directing them, as a matter of policy, to follow notice-and-comment procedures when issuing rules in areas that fall within this exemption. See 36 Fed. Reg. 2532 (1971); see also 47 Fed. Reg. 26,860 (1982). Accordingly, the Department has not invoked that exemption in this case.

cations" from the APA. The APA's definition of "adjudication" is derivative of its definition of "order." An "adjudication" is defined as "agency process for the formulation of an order," 5 U.S.C. 551(7), and "order" in turn is defined as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making." 5 U.S.C. 551(6). If any agency action that has an impact in the future were a "rule," however, then nothing would fall into the class of "orders" as defined by the APA. Those actions that are ordinarily termed "orders" would, under respondents' theory, turn out to be rules, because they have some impact as precedents on future proceedings and certainly have a very real future impact on the parties whose rights they determine. In short, the category of adjudications would be an empty set under respondents' theory. In fact, however, the APA defines and employs the term "rule" in its common-sense and accepted manner, referring to a measure that in itself has a direct *legal* effect in the future. It does not include agency actions that are fully consummated in the present simply because they may have *practical* consequences in the future.

B. RULEMAKING PROCEDURES WERE NOT REQUIRED BY THIS COURT'S DECISION IN *MORTON* v. *RUIZ*

Rather than holding that all resource allocation decisions by all federal agencies constitute "rules" subject to the APA's notice-and-comment procedures, the court of appeals relied on its notion of Indian law principles to announce an equally broad (and erroneous) holding that

"notice and comment procedures should be provided any time the government cuts back congressionally created and funded programs for Indians even when the Indians have no entitlement to the benefits." Pet. App. 15a (internal quotation omitted). That proposition represents a radical and unwarranted expansion of rulemaking requirements beyond those imposed by the APA, contravenes the pronouncements of this Court, and misconstrues this Court's decision in *Morton* v. *Ruiz*.

In *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), this Court emphatically held that federal courts have no authority to impose procedural requirements on federal agencies based on considerations of public policy. Under *Vermont Yankee*, a reviewing court is not free to force upon an agency the court's "own notion of which procedures are 'best' or most likely to further some vague, undefined public good." 435 U.S. at 549. Rather, courts are limited to determining whether the agency has complied with the procedures mandated by the relevant statutes. *Ibid.*

Nothing in the APA provides the slightest support for the court's holding that all agency decisions that may adversely affect Indians are automatically subject to notice-and-comment procedures.[20] Nor does any other statute or regulation require that agencies providing services to Indians engage in formal notice-and-comment rulemaking as a prerequisite to modifying or terminating

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[20] The legislative history of the APA in fact cuts against such a requirement. The House Report explains that the exception from notice-and-comment requirements for matters involving "public property," 5 U.S.C. 553 (a) (2), "include[s] property held by the United States in trust or as guardian, as Indian property is often held." H.R. Rep. No. 1980, *supra*, at 23. Thus, Congress specifically furnished an exemption where Indian interests are directly implicated.

whatever discretionary programs or services they offer. In particular, neither the Snyder Act nor the IHCIA—the principal statutes authorizing IHS expenditures on Indian health care—imposes any such requirement.[21]

Likewise, the "special relationship" between Indians and the federal government does not provide any basis for imposing such procedural requirements. As explained above, pp. 21-24, *supra,* that relationship is not an independent legal constraint on the actions of the federal government. The only specific and enforceable duties owed to Indians by the federal government are those derived from treaty, statute, or regulation. Since no treaty, statute, or regulation imposes the extraordinary notice-and-comment procedures adopted by the court of appeals in this case, the court's holding is in direct violation of *Vermont Yankee.*[22]

[21] In general, appropriations under the Snyder Act are "gratuitous appropriations of public monies." *Scholder* v. *United States,* 428 F.2d at 1129. IHS regulations make clear that there is no entitlement to particular IHS services and that the health services provided by the agency "to any particular Indian community will depend upon the facilities and services available from sources other than the [IHS] and the financial and personnel resources made available to the [IHS]." 42 C.F.R. 36.11(c).

[22] Congress has by statute directed the IHS to consult with Indian tribes before making certain decisions. For example, the IHS is required by the 1988 amendments to the IHCIA to consult with the affected tribes before building, renovating, or closing Indian health facilities. See Indian Health Care Amendments of 1988, Pub. L. No. 100-713, § 301, 102 Stat. 4812-4813. In addition, the BIA informs us that it has issued certain non-binding guidelines for consulting with Indian tribes on certain personnel management decisions. Thus, the fact that notice-and-comment rulemaking procedures need not be followed before the IHS revises or terminates discretionary programs does not necessarily mean that those agencies will act without taking into account the comments of Indians. In fact, direct consultation with the affected tribes may often be a more effective way of receiving the input of tribes and their members than would publication of a notice in the Federal Register and inviting written submissions to an office in Washington, D.C.

Nor does anything in this Court's decision in *Morton* v. *Ruiz,* 415 U.S. 199 (1974), which preceded *Vermont Yankee,* require a different conclusion. *Ruiz* involved a challenge to a provision in the BIA's unpublished internal manual that limited eligibility for general assistance to those Indians living "on" reservations. The Court found that the relevant statutes permitted those benefits to be available to Indians living on *or near* reservations. 415 U.S. at 230. The Court held that the BIA's failure to publish its narrower eligibility standard rendered that standard invalid. *Id.* at 235-236.

This Court did not decide *Ruiz* on the ground that the on-the-reservation eligibility standard was a "rule" under the APA that could only be promulgated through notice-and-comment procedures. Instead, it held that the BIA itself had declared that all such "directives" that inform the public of "eligibility requirements" must be published. *Id.* at 235. Indeed, the Court adverted to the fact that that publication requirement was "possibly more rigorous than would otherwise be required" by the APA, thus leaving open the question whether it would have been viewed as a rule absent the agency's own publication requirement. *Ibid.* The Court's holding was simply that the BIA "must comply, at a minimum, with its own internal procedures." *Ibid.*[23]

[23] Indeed, even if the Court had decided *Ruiz* on the ground that the on-the-reservation eligibility requirement at issue there was a "rule" under the APA, the decision would have little bearing on this case. The eligibility standard at issue in *Ruiz* may well have been a "statement" of "future effect," 5 U.S.C. 551(4), in the sense that future determinations of individuals' eligibility for IHS benefits would be controlled by that statement. Thus, unlike the resource-allocation decision at issue in this case, the eligibility requirement in *Ruiz* may well have been a "rule" under the APA.

Ruiz thus does not remotely suggest that all agency decisions adversely affecting Indians—especially those that are not "rules" under ordinary analysis—must be subjected to the full panoply of procedural requirements applicable to legislative rules. To the contrary, the Court's decision rested on the determination that the BIA had attempted to impose a rule of personal eligibility on individual Indians without following the procedures that the agency had imposed on itself for promulgating such rules. As such, it has no bearing on this case, which involves neither a rule nor personal eligibility for IHS services. This case involves the allocation of staff and other resources within the IHS and the general level and type of services that will be offered at particular locations. Nothing in *Ruiz* suggests that notice-and-comment procedures must be followed in that setting.

To be sure, this Court in *Ruiz* did refer to the federal government's duty "to deal fairly with Indians" and to "the distinctive obligation of trust incumbent upon the Government in its dealing with these dependent and sometimes exploited people." 415 U.S. at 236. But those references were made only after the Court had concluded that Congress had made Indians living near reservations eligible for benefits and that the eligibility requirement at issue there was the type of standard for which the agency's own rules prescribed publication. Thus, as the Court itself explained in the same paragraph in which it adverted to the federal government's "trust" responsibility, the federal government's duty of fairness was triggered by "the *legitimate* expectation of * * * Indians," and the agency could not "extinguish[ ]" those expectations by means of rules "not promulgated in accordance with its own procedures, to say nothing of those of the [APA]." *Ibid.* (emphasis added). Although the Court in that passage viewed the "trust" responsibility as a special reason why the government must carefully comply with its pre-existing legal obligations, the

Court did not suggest that the federal "trust" responsibility provided an independent source of legal duties that a court could impose upon an administrative agency that has dealings with Indians.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 91-1833

In The

Supreme Court of the United States

October Term, 1992

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, *et al.*,

Petitioners,

vs.

GROVER VIGIL, *et al.*,

Respondents.

On Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the agency's decision to terminate the Indian Children's Program (ICP), an on-going program established pursuant to congressional mandate and funding and agency rules governing eligibility and program services which for many years provided a crucial array of clinical and support services to handicapped Indian children with whom the United States has a special relationship, constitutes informal rulemaking subject to the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553.

2. Whether the court of appeals erred in holding that the special relationship between the Indian people and the federal government, the Snyder Act, 25 U.S.C. 13, and congressional creation and funding of a program providing clinical and support services to handicapped Indian children under the Snyder Act and Indian Health Care Improvement Act, 25 U.S.C. 1601 *et seq.*, provide "law to apply" for purposes of judicial review under the APA, 5 U.S.C. 701 *et seq.*, of the agency's termination of the program's services, where a strong presumption favors review, statutes enacted to benefit Indians provide law to apply which must be liberally interpreted in their favor, prior agency actions and rules established the children's ongoing eligibility for ICP services, the government provides health care to Indians pursuant to their special relationship, and the agency decision to terminate the ICP was based on an unjustified assumption that other resources would provide its services to the children.

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STATUTORY PROVISIONS INVOLVED

Relevant portions of the Snyder Act, 25 U.S.C. 13, and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, are found at Pet. App., 57a-58b and 63a-66a. Relevant portions of the Indian Health Care Improvement Act, 25 U.S.C. 1601 *et seq.*, the Indian Health Service manual, and additional relevant portions of the Administrative Procedure Act, are set forth at Resp. App. 1a-16a. ICP eligibility rules are set forth at Pet. Reply App. 1a-2a.

STATEMENT OF THE CASE

The Indian Children's Program ("ICP") is a joint program established by the Indian Health Service ("IHS") and Bureau of Indian Affairs ("BIA") in response to a critical unmet need for diagnostic and treatment services for handicapped Indian children. J.A. 43. After initiating the ICP in the late 1970's, establishing objectives and eligibility criteria, and renewing funding for the program for over a half-a-decade, the IHS and BIA abruptly terminated the program in 1985. The district court and court of appeals both held that the decision to terminate the program was subject to judicial review, but found that it was unnecessary to decide the merits of whether the decision was contrary to relevant law or arbitrary and capricious. 5 U.S.C. 706. They concluded that the decision to terminate was procedurally defective because before terminating the program, the agencies were first required to comply with the Administrative Procedure Act's provisions for publication of agency statements of policy, 5 U.S.C. 552(a)(1) and for notice and comment of an informal rulemaking, 5 U.S.C. 553. Accordingly, the district court ordered the agencies to reinstate the ICP until such time as they provided notice of the reasons for their decision and considered public comment from interested parties. Pet. App. 54a-55a. The court of appeals affirmed the district court's order and defendants sought review in this court. As a result, the ICP remains in place under the district court's reinstatement order. The only issues before this Court on review are whether there is "law to apply" for judicial review of the agencies' action and

whether the agencies are required to comply with informal rulemaking notice and comment provisions before terminating the ICP.

1. The Indian Children's Program

The ICP was established to carry out the mandates of the Snyder Act, 25 U.S.C. 13 and Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1601 *et seq*. The Snyder Act requires the IHS and BIA to "direct, supervise, and expend [Congressional appropriations] for the benefit, care, and assistance of the Indians throughout the United States" for specific purposes, including "[f]or relief of distress and conservation of health." 25 U.S.C. 13. The IHCIA was enacted in 1976 to supplement existing Indian health care programs. Title II of the Act authorized appropriations for specific programs, including "[t]herapeutic and residential treatment centers." 25 U.S.C. 1621(c)(4)(D). The IHCIA provides that funds appropriated under the Act are not to be used to displace or duplicate the services of other programs, but "to supply known, unmet medical, surgical, dental, optometrical, and other Indian health needs." 25 U.S.C. 1621(a).

IHS initiated what became known as the ICP by allocating $270,000 and 11 positions from its fiscal year 1978 general IHCIA Title II appropriation to the IHS Headquarters mental health branch in Albuquerque, New Mexico for the planning and development of a handicapped children's project, then referred to as the "Indian Children's Village." *Department of the Interior and Related*

Agencies Appropriations for 1979: Hearings before a Subcommittee of the Committee on Appropriations ("Approp."), Senate, 95th Cong., 2d. Sess., pt. 2, 252. At that time, IHS envisioned establishing a therapeutic and residential treatment center for disturbed Indian children "to focus effort and integrate resources in dealing with the problems of the handicapped child in accord with the philosophy and intent of" the IHCIA, and sought $3.5 million from Congress to construct such a center. *Approp. for 1978, House*, 95th Cong., 1st Sess., pt. 4, 182; *Approp. for 1979, Senate*, 95th Cong., 2d Sess., pt. 2, 252. Congress did not fund the proposed center, but, instead, appropriated $300,000 for fiscal year 1980 to the IHS to develop and expand program services into a nationwide program for handicapped Indian children in conjunction with the BIA. The funds were to be used "to provide diagnostic service[s] to children with complex problems who reside nationwide and who require a sophisticated medical treatment for their disorders." *See*, Pet. App. 5a and n. 2.

In 1979, the ICP became a joint project of the BIA and IHS. J.A. 29. The effort to fund a center was abandoned, and the ICP concentrated on developing interdisciplinary teams that traveled to reservation areas to provide diagnosis and treatment of the unmet medical needs of handicapped Indian children throughout the Southwest. These ICP teams consisted of persons qualified in physical therapy, speech pathology, occupational therapy, developmental psychology, educational diagnostics, art therapy, clinical psychology, and developmental pediatrics. J.A. 97.

The ICP provided an array of services to the children which included diagnosis of their handicaps, development and monitoring of their treatment plans, consultative visits in their home communities, training, and direct services such as physical therapy. The majority of children seen by the ICP were learning disabled, emotionally disturbed, mentally retarded, cerebral palsied, communication disordered or multiply handicapped. J.A. 11, 20. The vast majority of these direct, clinical services were provided to children in reservation areas in New Mexico, Colorado, Utah, and Arizona. This regional model was viewed as the foundation for expanding and replicating the same services in other areas. *Approp. for 1983, House*, 97th Cong., 2d Sess., pt. 9, 182.

In addition to these direct services to the children, the ICP also provided training and educational services nationwide. J.A. 75; R. 70, Exh. 5, No's 25-51; Kreuzberg Depo., Exh. 2. This national component included training in child development, prevention of handicapping conditions, and care of handicapped children to parents, community groups, school and health care personnel.

The joint agency interdisciplinary team approach of the ICP was soon judged a success. J.A. 53. It provided "a practical and economically feasible method by which the two agencies" could "fulfill their respective legal mandates [under the IHCIA and Education for All Handicapped Children Act of 1975 (EAHCA), 20 U.S.C. 1400 *et seq.*] in providing diagnostic and treatment planning services to handicapped Indian children." *Id.* Each year from 1980 through 1985, IHS represented to Congress that it continued to successfully operate the ICP to serve handicapped Indian children in response to Congressional

interest, and sought, and was provided renewed funding. *See*, Pet. App. 11a-13a and n. 6.

The IHS and BIA also promulgated eligibility criteria for the ICP during this time:

> The ICP will see any IHS or BIA/OIEP[Office of Indian Education Programs] eligible child from birth through 21 years who either has, is suspected of having, or is at risk of having a physical, mental, emotional handicap or combination of handicaps. *Handicap* is defined as an inability to function in a normal fashion. Severity of handicap is not a consideration for eligibility.
>
> * * *
>
> Any organization involved with Indian children, partially or totally, is eligible to receive education and training program services from ICP. Pet. Reply App. 1a.

The number of children in the Southwest who were eligible for ICP services was considerable. During a four-month period from November, 1979 through February, 1980, the ICP evaluated 329 Indian children and determined that 282 of them were handicapped and needed further action by the ICP. J.A. 61. During the next 12 month period, the ICP performed 2,011 diagnostic assessments, 1,803 case reviews, and provided direct services to 1,692 children. J.A. 62. In 1984, IHS Director Rhoades stated that while the ICP carried a registry of about 1700 children, it was his opinion that substantially less than half of the handicapped children eligible for the program were identified by IHS. *See*, R. 14, Exh. G.

2. Termination of the ICP

In 1985, the IHS unilaterally decided to terminate all of the direct services the ICP provided to handicapped Indian children. The decision was made without consulting the BIA, the Tribes, or the families of the children affected. The decision to terminate the program was never published in the Federal Register, nor was any formal statement of the reasons for the IHS change in policy provided. R. 70, Exh. 2, No's 11-14; R. 72 at 46; J.A. 99. Instead, the decision was announced to various IHS office and referral sources on August 21, 1985, J.A. 80; R. 70, Exh. 7, (Exh. 47). The BIA then withdrew from participation in the ICP and limited eligibility for its special education services to those children it was obligated to serve under the Education for All Handicapped Children Act. R. 70, Exh. 2, No. 4. These children were school age and enrolled in a BIA school. J.A. 100.

The termination of the ICP had a devastating effect. Many basic services for handicapped children, including services identified in the IHS Manual as health services that the IHS is to provide for Indian children, were no longer available from IHS. Chapter 13 of the IHS Manual states that "this section sets forth the IHS . . . responsibilities for meeting specific health needs of infants and children," and that "services must be provided that will emphasize the importance of preventing handicapping conditions or preventing the extension of existing conditions." IHS Manual 3-13.6(A). The Manual goes on to list specific services to be provided, including testing children for early identification of defects that may lead to handicaps, monitoring of children with handicaps, and "frequent and continuing medical attention." *Id.* at

3-13.6(F)(3). Following the termination of the ICP, such services were no longer available from the IHS for many handicapped Indian children. Handicapped Indian children could no longer obtain the screening and evaluation, physical therapy, occupational therapy, speech/language therapy, monitoring and other services previously provided by the IHS and BIA through the ICP. R. 108, Exh. 2-13, 15-16.

Moreover, in many instances, these services were not available from any sources. Thus, the ICP termination resulted in many known needs going wholly unmet because the children could not obtain the necessary services anywhere in the communities in which they lived. *Id.*; R. 70, Exh. 7 (Exh. 43-44). Lengthy, time-consuming and expensive trips to Albuquerque were often the only means to obtain any necessary services. R. 108, Exh. 2, 6, 10, and 13.

The effect of the ICP termination was particularly acute for pre-school children. Early detection and intervention services for handicapped children are crucial. J.A. 98. Without these services many pre-school children become further handicapped by the time they reach school age. *Id.* As noted above, one of the effects of the ICP termination was that eligibility for special education services available to handicapped children of any age was limited to children in BIA schools who qualified for such services under the Education for All Handicapped Act. Estimates by the General Accounting Office indicate that there are thousands of preschoolers in the Southwest

alone who lost their eligibility for these services upon termination of the ICP.[1]

The IHS official responsible for the decision to terminate the ICP also failed to adequately consider the unavailability of alternative services before making the decision, incorrectly assuming that the children would continue to receive the same services that they had been receiving from the ICP from other sources. Kreuzberg Depo. pp. 72-73, 81,87,90-91, 95, 107-108, and Exh. 12. Community health care providers, within and without IHS, expressed great concern that the ICP termination eliminated critical services for handicapped Indian children that could not be replaced or duplicated. R. 70, Exh. 5, No's 54-71; R. Exh. 7 (Exh. 42-46, 50-51, 56, 57, 60, 61, 62, 64) However, because the decision to terminate the ICP was made without prior notice and comment, they were not afforded an opportunity to present their views to agency officials before the decision was made.

3. Proceedings Below

A suit challenging the ICP termination was filed on September 26, 1986, on behalf of handicapped Indian children eligible for ICP services. J.A. 5. The complaint challenged the termination of the ICP services on the

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[1] GAO Report, "Special Education: Estimates of Handicapped Preschoolers and Sufficiency of Services," March, 1990. Based on handicapping condition prevalence report estimates, there are 650 handicapped Indian preschool children in New Mexico and 2,485 in Arizona. *Id.* at 42.

basis that the action violated the publication requirements of the APA, 5 U.S.C. 552(a)(1), and the requirements of notice and comment for informal rulemaking under the APA, 5 U.S.C. 553. The children also charged that the decision violated the Snyder Act, Indian Health Care Improvement Act, federal trust responsibility to Indians, various agency rules, their Fifth Amendment due process rights, and was arbitrary and capricious. Plaintiffs alleged that the termination of the ICP deprived them of essential diagnostic, evaluation, treatment planning and therapy services, and that these services were not available from the IHS or alternative sources. Plaintiffs sought declaratory and injunctive relief requiring defendants to reinstate the ICP.

The district court certified a class of handicapped Indian children eligible for ICP services, and granted them summary judgment. It ruled that the ICP termination was subject to judicial review under the APA, rejecting defendants' argument that the decision was committed to agency discretion under 5 U.S.C. 701(a)(2) because there is no law to apply. The court concluded that the Snyder Act, the IHCIA, the EAHCA, the federal government's trust duty to Indians, and the agency's representations to Congress concerning the ICP provided ample law to apply.[2] Pet. App. 30a. In particular, the

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[2] Under the Education for All Handicapped Children Act, 20 U.S.C. 1400 *et. seq.*, the BIA is responsible for identifying, evaluating, and providing handicapped Indian children on Indian reservations with a free appropriate public education which emphasizes special education and related services to meet their unique needs. Congress expressly provided for the BIA to receive funding for the education of these children

court noted that the Snyder Act provided law to apply because review of defendants' action against the statute's provisions presents "a palpable question: whether the action ultimately does redound to the 'benefit, care, and assistance' of Indians" or whether it "defeats congressional purposes or flouts the legislative mandate." Pet. App. 31a. The court also noted that the agency's own regulations and departure from past policy and practices provide law to apply for review of the agency decision. Pet. App. 32a and n. 10.

The district court however, found that the termination decision was not ripe for a determination on the merits because the agencies had failed to comply with the procedural requirements of the APA. Pet. App. 34a-35a. The district court concluded that the decision to terminate the ICP was a "statement of general policy" that the agencies were obligated to publish in the Federal Register under 5 U.S.C. 552(a)(1). Pet. App. 41a-42a. In addition, the district court found that the impact of the termination

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pursuant to the requirements of the EAHCA. 20 U.S.C. 1411(f)(1982). The ICP was funded and operated as a way for the BIA to meet its obligations under the Act. J.A. 53, 65 95-96; *Approp. for 1980, Senate*, 96th Cong., 1st Sess., pt. 2, 1542,1543. Since the EAHCA addresses many of the services provided by the ICP to handicapped Indian children, including their identification, evaluation, placement, and related services, 20 U.S.C. 1413, the district court was correct in finding that it provides law to apply. In addition, 20 U.S.C. 1412(7) specifically required the BIA to provide public hearings and comment opportunity prior to its adoption of policies, programs, and procedures affecting its provision of special education services. The BIA admitted no such procedures were followed when the ICP was terminated. J.A. 98; R. 70, Exh. 2, No's 11, 14.

of the program on the rights of those eligible for its services demonstrated that it was more than merely a statement of policy and constituted "legislative" rulemaking under the APA. Pet. App. 39a-40a. Accordingly, the court concluded that in addition to failing to comply with the publication requirement, the action was also defective because the agencies had failed to follow notice and comment procedures before making their decision. *Id.*

The agencies appealed, arguing that the termination of the ICP was committed to agency discretion, that the decision to eliminate the ICP was not rulemaking subject to the notice and comment procedures of 5 U.S.C. 553, and that the decision was not arbitrary and capricious. The government did not appeal the district court's independent holding that the decision to terminate the ICP was a statement of policy that the agency was obligated to publish in the Federal Register under 5 U.S.C. 552(a)(1), nor did it appeal the relief granted by the district court.

The Court of Appeals for the Tenth Circuit reviewed the district court's decision *de novo* and affirmed its grant of summary judgment to the children. The court of appeals agreed that the statutes, statements by the agency concerning the ICP, and the special fiduciary responsibility of the federal government to Indians provided law to apply in reviewing the agency's decision. It also found that the district court was correct in holding that APA notice and comment proceedings were necessary, citing *Morton v. Ruiz*, 415 U.S. 199 (1974), in which this Court held that the government could not change its eligibility requirements for a federally funded benefits

program for Indians without complying with the notice and comment procedures of the APA.

SUMMARY OF ARGUMENT

1. The termination of the Indian Children's Program, which eliminated the children's on-going eligibility for its services, was a legislative "rule" which the agency implemented in violation of the procedural requirements of the APA. The notice and comment requirements of 5 U.S.C. 553 were designed to ensure fairness and mature consideration of rules of general applicability. Having established the program to provide critically needed "[t]herapeutic and . . . treatment" services to handicapped Indian children and having adopted eligibility criteria specifying the services to be provided and defining those who would be served, the agency was required to inform the public and those eligible for these services before changing its rules. 25 U.S.C. 1621 (c)(4)(D). Having pursued a policy of providing handicapped Indian children with services through the ICP for many years and continuously representing this policy to Congress during those years, the agency was obligated to comply with the notice and comment requirements "to avoid the inherently arbitrary nature of unpublished ad hoc determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). The goal of fairness through legislative rulemaking is particularly important here, where the special Federal-Indian relationship requires of the agencies an "overriding duty . . . to deal fairly with Indians wherever located." *Id.* at 236. Thus, the court of appeals was quite correct in determining that "notice and comment procedures should be provided any

time the government 'cuts back congressionally created and funded programs for Indians.'" Pet. App. 15a.

2. Since the government did not appeal the district court's holding that the termination decision was a "general statement of policy" which the agency was required to publish in the Federal Register before it could become effective, the relief granted below must be affirmed.

3. Instead of dealing fairly with the children, the agency abruptly changed its policy, terminating all of the services it had provided to them, doing so despite the fact that alternative resources to replace those of the ICP were not available. The agency not only "failed to consider [this] important aspect of the problem," *Mot. Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), it also failed in its "consideration of the relevant factors." *Citizens to Preserve Overton Park v. Volpe*, 410 U.S. 402, 415 (1971). Instead of "maintain[ing] and improv[ing]" their health and providing them with the "quantity and quality of health services which will permit the[ir] health status . . . to be raised to the highest level possible," the ICP termination *created* a situation which seriously harmed the children and lowered their health status. 25 U.S.C. 1601(a) and (b) and 1602. This undermined the "Indian people's growth of confidence in Federal Indian health services" upon which "[p]rogress toward the goal of better Indian health is dependent." 25 U.S.C. 1601(g). Instead of providing them with "benefit, care, and assistance," as required by the Snyder Act for their "relief of distress," the ICP termination caused them great harm. Thus, the agency not only failed to consider important facts bearing on its decision and those very factors Congress was concerned with in acting the IHCIA,

but it acted in a manner directly contrary to the purposes of these statutes.

Congress gave every person adversely affected by an agency's action the right to judicial review. The right to this review is presumed in every case and is so strong that it can only be denied when a statute specifically precludes such review, or the matter is committed to agency discretion by law. Only when there is no law to apply by which a reviewing court can meaningfully judge the agency's action can it be committed to agency discretion. This exception is a rare and very narrow exception. Here, where the Snyder Act and IHCIA express the clear purposes which Indian health care is intended to accomplish, and set out specific factors which Congress wants the IHS to consider in making its health care decisions, it cannot be said that there is *no law* to appiy. In addition, the actions of the agency in establishing the ICP, in pursuing a policy of providing services to handicapped Indian children through the ICP, in adopting eligibility rules for the provision of these services, and in representing to Congress its policy, eligibility rules, and provisions of services, provide law by which its termination decision can be reviewed.[3]

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[3] The children also stated a constitutional due process claim, Pet. App. 29a, which requires judicial review even if judicial review is otherwise precluded by 701(a)(2). *Webster v. Doe*, 486 U.S. 592 (1988).

ARGUMENT

I. THE ICP TERMINATION ACTION WAS A "RULE" SUBJECT TO APA NOTICE AND COMMENT REQUIREMENTS.

A. The Procedural Requirements of the APA Provide Law to Apply

Judicial review is proper when claims are presented that procedural requirements of the APA have been violated. Adequate procedure is a legal judgment and must be guaranteed by the courts. C. Koch, Jr., *Administrative Law and Practice*, II, 136. 5 U.S.C. 552 and 553 set out binding procedural requirements which themselves provide "law to apply".[4] Actions violating these requirements must be set aside as "not in accordance with law." 5 U.S.C. 706(2)(A), or "without observation of procedure required by law." 5 U.S.C. 706(2)(D).[5] The district court thus exercised wise judicial restraint in determining only the APA procedural issues, thereby avoided unnecessary use of judicial resources to decide the other claims which were ripe for review only upon prior agency compliance

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[4] The government concedes that 5 U.S.C. 553 provides "law to apply" even when a reviewing court lacks jurisdiction to review the merits of an agency decision. Govt. Brief at 10, n. 8.

[5] The prefatory phrase, "to the extent that," 5 U.S.C. 701(a), establishes that an action can be partially reviewable. R. Levin, 74 Minn. L. Rev. 689, 701, (1990) Only "to the extent that" there is no law to apply is the action unreviewable. Here, whether or not the merits of the ICP termination would ultimately withstand "arbitrary and capricious" review, the manner in which the IHS terminated the ICP can be reviewed under the procedural requirements of the APA.

with the APA procedural requirements. *Bellarno International v. FDA*, 678 F.Supp. 410 (E.D.N.Y. 1988).

B. The Agency Decision to Terminate Services to Eligible Handicapped Children Under the ICP Was A "Rule".

An APA "rule", 5 U.S.C. 551(4), has three distinct elements: (1) it is the whole or part of an agency statement; (2) it is of general or particular applicability and future effect; and (3) it is designed to implement, interpret or prescribe law or policy, *Abbs v. Sullivan*, 756 F.Supp. 1172 (W.D. Wis. 1990). Rulemaking can be described in terms of three key indicators: (1) generalized nature, (2) policy orientation, and (3) prospective applicability. Koch, I, 61.

The predominant characteristic of a rule is that it has future effect. *PBW Stock Exchange, Inc. v. Securities and Exchange Commission*, 485 F.2d 718 (3d Cir. 1973), *cert. den.* 416 U.S. 969 (1974). The prospective operation of the rule separates it from that of an order, which serves as a determination of past conduct or present status. J. O'Reilly, *Administrative Rulemaking*, 2.01. While rulemaking gathers information about past conduct, it focuses on making judgments which will affect conduct in the future. Koch, I at 62. "The objective sought in delegating rulemaking authority to an agency is to relieve Congress of the impossible burden of drafting a code explicitly covering every conceivable future problem." *Mourning v. Family Publications Service*, 411 U.S. 356, 376 (1973).

The primary factor distinguishing a rule from an adjudicative order is the "general applicability" of the former; an action addressed to a category of persons or situations is a rule. E. Gellhorn and R. Levin, *Administrative Law and Process*, 315, "Rulemaking is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class." *American Airlines v. CAB*, 359 F.2d 624, 636 (D.C. Cir. 1966) *cert. den.* 385 U.S. 843 (1966). The effect of the particular applicability clause is that when an agency issues a directive to a class, that action can be a rule as long as it has future effect. *Attorney General's Manual on Administrative Procedure Act*, 13 (1947). The generalized nature of rulemaking relates to its focus on formative issues. Koch, I at 61.

Finally, rulemaking is primarily concerned with policy considerations. B. Mintz and N. Miller, *A Guide to Federal Agency Rulemaking*, 39-40 (Administrative Conference of the United States, 1991). Rulemaking gathers facts for the purpose of making policy-type determinations. Koch, I at 61, Rulemaking is concerned with implementation or prescription of future law or policy. L. Modjeska, *Administrative Law: Practice and Procedure*, 1.8.

The IHS action terminating all direct ICP services and redirecting staff efforts into a national data gathering and technical assistance role was thus a "rule". The IHS decision was announced in an "agency statement" issued to various IHS offices and public referral sources. R.70, Exh. 7 (Exh. 47); J.A. 77. The decision had "general or particular applicability" to all handicapped Indian children who were eligible for ICP services, including the 426 children who were active ICP clients when the decision was

announced. It had "future effect" by completely eliminating services which the children were previously eligible to receive. The agency knew that its action would have this future effect on the children. The government knew the children required the long-term involvement and services the ICP had provided, holding meetings after the termination in some of the communities where the children lived to try to arrange for alternative care. J.A. 12-13, 22, 98. Through the years, the agency had provided an array of direct services to handicapped Indian children. The ICP was specific in its organizational structure, location, funding, staffing, services, and eligibility for services. When the IHS announced its decision to terminate direct services and redirect its efforts to consulting and training, it prescribed a major policy change which affected every aspect of the ICP. The decision was thus "designed to implement. . . . or prescribe law or policy," making it a "rule".

C. The Decision Was Not An Interpretative Rule But a Substantive Rule That Required Notice and Comment Procedures.

The determination that a given agency action is a "rule" does not alone establish the necessity for notice and comment rulemaking under 5 U.S.C. 553. There are various types of rules, not all of which require rulemaking. 5 U.S.C. 553(b)(3)(A).[6] "Substantive" or "legislative" rules require notice and comment rulemaking. 5 U.S.C.

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[6] However, the government expressly disclaims that the agency action was exempt from 553 rulemaking, Govt. Brief, n. 19.

553. "Interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" do not. 5 U.S.C. 553(b)(3)(A).

Substantive rules implement existing law by imposing general, extrastatutory limitations or obligations, while interpretative rules merely clarify or explain existing law. *Alcaraz v. Block*, 746 F.2d 593 (9th Cir. 1984). An interpretative rule is simply what an administrative official thinks a statute means. *Jerri's Ceramic Arts v. Consumer Product Safety Comm'n*, 874 F.2d 205 (4th Cir. 1989). In making this determination, it is not the agency's own characterization of its actions, but what the agency did in fact which determines whether rulemaking is required. *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478 (2d Cir. 1972). A substantive rule has "the force and effect of law" and is always "rooted in a grant of . . . power by the Congress." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). This "binding effect" is a chief identifying feature of a substantive rule. Gellhorn and Levin at 316. The force and effect of these rules require that some opportunity to be heard must precede their promulgation. Koch, I at 133.

A rule is substantive where it implements the legislative scheme. Where the agency "attempted through this regulation to supplement the Act, not simply construe it. . . . the regulation must be treated as a legislative rule." *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464, 469 (D.C. Cir. 1980). Agency intentions in promulgating rules are not often precise and a determination whether a legislative rule should have been made through notice and comment procedures must look behind the rulemaking. Koch, I, at 135. Rules which do more than "clarify" must be analyzed to determine

whether they have binding effect. *Id.* at 147. The impact of a rule thus helps determine whether the agency was exercising its legislative rulemaking power in making the rule in question. *Id.* at 148.

Courts thus look at the effect of the rule on those interests ultimately at stake. *Neighborhood TV Co., Inc. v. F.C.C.*, 742 F.2d 629 (D.C. Cir. 1984). The determination whether a rule is legislative will frequently turn on whether the rule makes a substantial impact on the rights and duties of persons subject to the rule, or upon the public. *See, e.g., Standard Oil v. Department of Energy*, 596 F.2d 1029 (1978). Impact, and not the agency's phrasing determines whether an agency's guidelines are rules. *Western Coal Traffic League v. United States*, 694 F.2d 378 (5th Cir. 1982) *on reh.* 719 F.2d 772 (1983) *cert. den.* 466 U.S. 953 (1984).

By terminating all direct ICP services to the children and redirecting staff effort to a national consulting effort, the IHS was implementating in a drastically different way the "therapeutic and residential treatment centers" provision of the IHCIA under which it instituted the ICP. The action was taken pursuant to its Congressional grant of power regarding Indian health care. The agency did not merely issue an explanation of what is felt the law was, however, but acted in a very specific and substantive manner by directing the elimination of services and the reallocation of ICP staff. This action imposed upon the children and general public a significant change in agency policy regarding service obligations it had undertaken for handicapped Indian children under the IHCIA. The action was legislative not only because of its future effect but because of its primary concern with policy

considerations. *American Express Co. v. United States,* 472 F.2d 1050 (C.C.P.A. 1973); Mintz and Miller at 39-40.

The government attempts to paint its termination of all direct services to handicapped Indian children as not being "substantive" by describing it as a self-contained agency resource reallocation decision. Pet. at 17. The government is disingenuous in describing an action which eliminated crucial services the children had relied for many years as "self-contained". The IHS instituted ICP services in direct response to Congressional legislation providing additional appropriations for "therapeutic and residential treatment centers" to provide for their "unmet . . . need" for diagnostic and treatment services. 25 U.S.C. 1621(a) and (c)(4)(D). The termination involved critical treatment *services for them,* not merely internal administrative staff changes. To characterize the agency action as a self-contained agency resource reallocation decision is very one-sided, describing the program only in terms of the agency and completely ignoring those children the program served. The ICP did not exist simply to satisfy staff needs or internal demands of the agency, but to provide specific help to specific Indian children.

An agency statement which results in a change of "existing law, policy or practice" is a legislative rule requiring notice and comment rulemaking. *Knutzen v. Eben Ezer Lutheran Housing Center,* 815 F.2d 1343, 1351 and n.6 (10th Cir. 1987). An agency change in an existing rule which has substantial impact upon rights of the public requires rulemaking. *National Retired Teacher's Ass'n v. U.S. Postal Service,* 430 F.Supp. 141, 148 (D.D.C. 1977) *aff'd* 593 F.2d 1360 (D.C.Cir. 1979); *Brown Exp., Inc. v. United*

States, 607 F.2d 695 (5th Cir. 1979); *State of Alaska v. Department of Transportation,* 868 F.2d 441 (D.C. Cir. 1989). As the Court stated in *Mot. Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 41-42 (1983),

> revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to proper course. . . . Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first place.

The government's change in policy from years of providing direct services to eligible handicapped Indian children to one ceasing those services is exactly the type of change in existing policy which requires rulemaking.

Changes which affect eligibility are particularly subject to rulemaking. *Lewis-Mota v. Secretary of Labor,* 469 F.2d 478 (2d Cir. 1972); *Lewis v. Weinberger,* 415 F.Supp. 652 (D.N.M. 1976). In *Vigil v. Andrus,* 667 F.2d 931 (10th Cir. 1982), for example, the court held that the BIA's termination of a lunch program for all Indian children and its transfer of responsibility for the program's services to the USDA, which served a more limited group of Indian children, without first publishing notice of the proposed action, violated the APA. The IHS and BIA established rules determining who was eligible for ICP services. Pet. App. 1a. The agencies applied these rules in their operation of the ICP to referrals from sources in the community and to parents seeking ICP services for their children. The announcement that the ICP would no longer provide direct services to handicapped Indian

children changed their eligibility and required rulemaking to be effective.

D. *Overton Park* Distinguished

The government relies on *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), for its proposition that the ICP termination action was not rulemaking. The government's contention that *Overton Park* held that all agency actions concerning expenditures of funds are not subject to rulemaking, Govt. Brief at 31-33, is an erroneous interpretation of that decision. *Overton Park* held that an agency decision to expend federal funds to build a particular interstate highway through a public park in Memphis, Tennessee was not rulemaking or a formal adjudication that required a hearing on the record. 415 U.S. at 414-415. This holding did not declare, or even imply, that agency spending decisions never involve rulemaking.[7]

In contrast to *Overton Park*, the agency action here involved an on-going program which provided services for many years to needy recipients with whom the government has a special relationship. The agency decision here was not limited to a particular site or individual, but involved termination of an entire program created and

[7] The examples of agency actions which the government describes as funding or resource allocations and fears would always require rulemaking, Govt. Brief at 32-33, are subject to the rulemaking exception for matters "relating to agency management or personnel or to public property, loans, grants, benefits or contracts." 5 U.S.C. 553(a)(2).]

defined by the agency itself. In creating the ICP, the IHS and BIA adopted standards of general applicability which determine who is eligible for the program and define the services to be provided. Thus, unlike the situation presented in *Overton Park*, the ICP termination involved a change in general "rules," articulated by the agency in advance to govern the availability of services to each individual who applied for services under the program.

Where an agency exercises its power to establish a program, specifies the services that will be provided, and adopts eligibility criteria identifying the individuals to be served, the agency is not merely making a spending decision, but is exercising its legislative authority to create law defining the services to be provided by the government, and who is eligible to receive them. Such standards clearly constitute "rules". The revocation of the program revoked these rules, or, in the case of the BIA, altered the eligibility standards so handicapped Indian children who were not in BIA schools were no longer eligible. Like any other agency action that defines, limits eligibility, or terminates a program that promises services to specified individuals, the agency's action here constituted rulemaking.

E. The Purposes of the APA Are Met By Requiring Notice And Comment Procedures

The rulemaking requirements of 5 U.S.C. 553 were designed to assure fairness and mature consideration of rules of general application. *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Congress chose notice and comment procedures to ensure that agency policy decisions

are "both informed and responsive." *American Bus Association v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980). These "procedures exist for good reason: to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rule-making before an informed and skeptical public." *New Jersey v. Department of HHS*, 670 F.2d 1262, 1281 (3d Cir. 1981). 553 rulemaking is an especially attractive way to make policy democratically. K. Davis, *Administrative Law Text*, 142. While the benefits of notice and comment rulemaking are well established, the government's fear that a rulemaking requirement in this case would adversely affect the operation of Indian health programs is unsubstantiated. The APA specifically provides an exception from rulemaking whenever "the agency for good cause finds . . . that notice and public procedures are impracticable, unnecessary, or contrary to the public interest." 5.U.S.C. 553(b)(3)(B). 5 U.S.C. 553(d)(3) also allows an agency, upon finding good cause, to make a rule effective immediately, thereby avoiding the 30 day delayed effective date requirement of 553. Thus, the only effect that rulemaking here will have on the government operation of its Indian programs is that very effect that Congress intended when it enacted the APA, that "administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

F. The Obligations of the Federal Government's Special Relationship to Indians Require Notice and Comment Procedures Prior to Termination of Services to Indians.

The federal government has certain responsibilities to Indians which derive from their long-standing and unique relationship, first described by Justice Marshall as the relationship of "a ward to his guardian". *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). "Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court," the government has "charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942). "The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions." *Morton v. Ruiz*, 415 U.S. 199, 236 (1974). Given the long history of unfair treatment and broken promises to Indian people in this country, the "duty . . . to deal fairly" recognized by this Court must mean more than empty words. At a minimum, the manner in which the ICP was terminated can be reviewed under this duty of fairness. *See, e.g. Kenai Oil & Gas, Inc. v. Dept. of Int. of U.S.*, 671 F.2d 383 (10th Cir. 1982). While the agency may "create reasonable classifications and eligibility requirements in order to allocate the limited funds available," the "agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries." *Morton v. Ruiz*, 415 U.S. 199, 230-231 (1974). Thus, it is appropriate that prior

to termination of services to Indians, they be given notice and opportunity to comment. *See, e.g., Vigil v. Andrus*, 667 F.2d 931, 936 (10th Cir. 1982)

Furthermore, this Court has specifically recognized that in "extemely compelling circumstances," the courts have the power to fashion and require agencies to afford procedural protections which are neither required by the Constitution nor the APA. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978). The summary, no-notice termination of an entire program providing critical services for Indian children to whom the government has a special responsibility presents exactly the type of situation in which at least the minimal procedural protections of notice and comment should be afforded.

II. THE RELIEF GRANTED BELOW MUST BE AFFIRMED BECAUSE THE GOVERNMENT FAILED TO APPEAL THE DISTRICT COURT'S RULING THAT THE ICP TERMINATION DECISION WAS A STATEMENT OF GENERAL POLICY THAT THE AGENCY WAS OBLIGATED TO PUBLISH IN THE FEDERAL REGISTER BEFORE IT COULD BECOME EFFECTIVE.

In addition to holding the ICP termination ineffective for violation of the rulemaking requirements of 5 U.S.C. 553, the district court held that ICP termination ineffective for violation of the publication requirements of 5 U.S.C. 552(a)(1). The district court ruled that the termination decision was a general statement of policy which the agency was obligated to publish in the Federal Register before it could become effective. Pet. App. 41a-42a. Since

the government did not appeal this holding, the relief granted below must be affirmed.

III. TERMINATION OF THE ICP WAS ALSO SUBJECT TO JUDICIAL REVIEW TO DETERMINE WHETHER THE AGENCY ACTION WAS CONTRARY TO LEGISLATIVE MANDATE OR ARBITRARY AND CAPRICIOUS

A. The Presumption In Favor Of Judicial Review And The Canon That Statutes Enacted To Benefit Indians Be Construed In Their Favor Required Review Of The ICP Termination.

1. A Strong Presumption Favors Judicial Review of Agency Actions

The Administrative Procedure Act provides that "[a] person . . . adversely affected or aggrieved by agency action . . . is entitled to judicial review." 5 U.S.C. 702. In determining whether judicial review is proper, "[w]e begin with the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667, 670 (1986). The presumption in favor of judicial review

> is a well entrenched precedent that reflects widely held convictions about the value of judicial review in our system of government . . . Scrutiny of administrative action by an independent judiciary is an integral part of the American checks and balances system – a powerful deterrent to abuses of power and an effective remedy when abuses occur. By helping maintain public confidence that government

> officials remain subject to the rule of law, judicial review also bolsters the legitimacy of agency action.

R. Levin, 74 Minn. L. Rev. 689, 742 (1990).

Only when "statutes preclude judicial review" or when the "agency action is committed to agency discretion by law" is judicial review excluded. 5 U.S.C. 701(a)(1) and (2). The exception for agency action committed to agency discretion is a "very narrow exception". *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). It applies only "in those rare circumstances where statutes are drawn in such broad terms that in a given case there is no law to apply," *Id.* In *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), the phrase "no law to apply" was explained to exclude judicial review where the statute contains "no meaningful standard against which to judge the agency's exercise of discretion."[8] However, "[t]he general exception to reviewability provided by 701(a)(2) for action 'committed to agency discretion' remains a narrow one," *Heckler v. Chaney*, 470 U.S. at 838, and the Court has remained firmly committed to the presumption in favor of judicial review. *See, Bowen v. Michigan Academy of Physicians*, 476 U.S. 667 (1986); *Traynor v. Turnage*, 485 U.S. 535 (1988); *United States v. Fausto*, 484 U.S. 439 (1988); *McNary v. Haitian Refugee Center*, 498 U.S. ___, 111 S.Ct. 888 (1991).

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[8] The presumption of unreviewability for an agency refusal to take enforcement action found in *Heckler v. Chaney*, 470 U.S. 821 (1985), is inapplicable in other contexts. *Robbins v. Reagan*, 780 F.2d 37 (D.C. Cir. 1985). The agency action here was affirmative, terminating an entire program.

The Court has limited the exception to judicial review "to cases involving national security . . . or those seeking review of refusal to pursue enforcement actions." *Franklin v. Massachusetts*, 505 U.S. ___, 120 L.Ed.2d 636, 661 (1992) (Concurring Opinion). "These are areas in which courts have long been hesitant to intrude." *Id.* at 662. The administration of Indian affairs through government programs implemented to serve Indian people is not such an area of traditional deference.[9] *See e.g., Morton v. Ruiz*, 415 U.S. 199 (1974); *White v. Califano*, 581 F.2d 697 (8th Cir. 1978); *McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987); *Fox v. Morton*, 505 F.2d 254 (9th Cir. 1974); *Vigil v. Andrus*, 667 F.2d 931 (10th Cir. 1982); *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569 (9th Cir. 1980); *Lewis v. Weinberger*, 415 F.Supp. 652 (D.N.M. 1976). Although the federal government has intruded extensively in the affairs of Indian people throughout the more than two centuries of their relationship, Indian people have not fared well and their health care lags behind that of other Americans. The respondents, who are handicapped, children, and Indian, are perhaps the most disenfranchised segment of our society. Judicial review safeguards the interests of those who are unable to participate in the political process. To ensure that the IHS and BIA responsibly carry out their administration of Indian

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[9] Although the government cites various cases for its proposition that all agency resource allocation and economic decisions are judicially unreviewable, Gov't Brief at 28-29, none of these cases involved termination of an entire program providing direct health services to a group of people with whom the government has a special relationship. Moreover, the termination of the ICP was not based on a funding reduction. J.A. 97.

affairs, judicial review must be made available to the Indian people they exist to serve.

2. Statutes Enacted to Benefit Indians Must be Liberally Construed in Their Favor.

Statutes enacted to benefit Indians must be liberally construed in their favor. *Fox v. Morton*, 505 F.2d 254 (9th Cir. 1974); *Wilson v. Watt*, 703 F.2d 395 (9th Cir. 1983). Thus, the Snyder Act and the IHCIA must be interpreted in such a way as to favor, rather than restrict, judicial review under the APA. This is especially true here where the children have stated claims that these Acts have been violated by the very agencies obligated to serve them. If there is any uncertainty as to the construction of these Acts, they must be interpreted in the children's favor pursuant to this "eminently sound and vital canon," *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n. 7 (1976). "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith. (citation omitted)." *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956).

B. The Applicable Statutes, Prior Agency Actions, And Legal Principles Governing The Federal Government's Obligations Toward Indians All Provide Law To Apply For Judicial Review Of The ICP Termination.

1. Statutes

a. The Snyder Act

The Snyder Act, 25 U.S.C. 13, requires that "the Bureau of Indian Affairs . . . shall direct, supervise, and expend such moneys as Congress may . . . appropriate, for the benefit, care, and assistance of the Indians . . . [f]or relief of distress and conservation of health." Agency actions not in accord with these requirements are contrary to the purposes of the Act. Although broad, this standard is not so devoid of meaning as to grant the agencies unfettered discretion in their use of its funding. The standard is sufficient to determine whether an agency action follows the purposes of the Act or is one which fundamentally undermines its mission.

It is not enough for the agency to say that the Snyder Act permits it to redirect "staff efforts into a national data gathering and technical assistance role," Pet. App. 20a, when that action comes at the expense of the health and development of thousands of handicapped children in the Southwest. The agency's termination of the entire program, eliminating services to a whole group of children, in a large area of the country, is the kind of broad action which can be judged by a broad standard. The test is not whether a statute viewed in the abstract lacks law to be applied, but, rather, whether *in a given case* there is no law to be applied. *City of Santa Clara v. Andrus*, 572 F.2d 660,

666 (9th Cir. 1978) *cert. den.* 439 U.S. 859 (1978). No matter how this question might ultimately be decided in a review on the merits, however, *access* to that review is not precluded by the breadth of the Snyder Act standard. Substantial deference is already granted to agencies in the *scope* of review determination. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). To move this deference up into the threshold jurisdictional determination will eviscerate the presumption in favor of judicial review and turn the "very narrow" and "rare" exception into the norm, contrary to the intent of the APA.

b. The Indian Health Care Improvement Act

The ICP was funded pursuant to the IHCIA, 25 U.S.C. 1601 *et seq.*[10] The IHCIA provides funds for specified services and programs to supplement Snyder Act funding. Thus, when Congress passed the IHCIA it constrained the discretion IHS may have had under the broad mandate of the Snyder Act and required IHS to use IHCIA funds for those services and programs Congress wanted provided to Indian people. In specifying that certain funds and positions be used for "therapeutic and residential treatment centers," in order to provide for "known, unmet . . . Indian health needs," 25 U.S.C. 1621(a) and (c)(4)(D), Congress did not intend that IHS use these funds for consulting and training.

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[10] The government admitted that the ICP was funded by the IHS under the IHCIA. Gov't 10th Cir. Brief at 3-6. *See, also, Approp. for 1985, House*, 98th Cong., 2d Sess., pt. 3, 486.

The goals of the IHCIA and the specific factors with which Congress was concerned in enacting it provide further standards by which to review the ICP termination. Congress declared that

> it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligations to the American Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with resources necessary to effect that policy. 25 U.S.C. 1602.

Since IHS is the nation's lead agency for the provision of health care services to Indians, the mandate of the IHCIA is the mandate of the IHS, providing a measure by which all IHS actions may be judged.

Congress identified certain specific factors plaguing Indian health care which it wanted IHS to address. *See* 25 U.S.C. 1601(f). IHCIA funding was to be used to overcome these problems. The Act thus provides parameters within which the problems of handicapped Indian children's health care are to be overcome and their health improved, not parameters within which IHS could reduce their health care and lower their health status. A reviewing court can thus "consider whether the decision was based on a consideration of the[se] relevant factors" to determine "whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).[11]

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[11] "[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to considered, entirely failed to consider an

25 U.S.C. 1601(a) provides that Indian health services are "required" by the special Federal-Indian relationship and must be used to "maintain and improve" the health of Indian people. 1601(f) notes that health care is imperiled by insufficient services. 1601(b) establishes that congress seeks to provide both a sufficient "quantity and quality of health services which will permit the health status of Indians to be raised to the highest level possible." As a result of the ICP termination, both the quality and quantity of IHS services to handicapped Indian children were greatly reduced. The ICP termination actually *created* a situation where the children had inadequate or no services available to them. R. 108, Exh. 2-13, 16. While insufficient funding will result in an insufficient quantity of services to meet all needs, *existing* services must be provided in a way which "raises" Indian health status. The IHS action here caused the children substantial harm, reducing rather than raising their health status.

25 U.S.C. 1601(f)(5) provides that lack of access to health services due to "remote residences, undeveloped or underdeveloped communication and transportation systems, and difficult, sometimes severe, climate conditions" must be overcome. The ICP was perhaps unique in its ability to meet these difficulties. By its service delivery model using traveling teams in remote, rural, reservation

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important aspect of the problem, offered an explanation for its decision which runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Mot. Veh. Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

areas, IHS was able to provide the ICP services in the childrens' home communities.

25 U.S.C. 1601(g) requires that health care services be provided to the Indian people in a way which accomplishes their "growth of confidence" in that care. Summary termination of a program which had for years provided essential services could certainly be found to accomplish exactly the opposite result and thus be determined arbitrary. Dr. Robert Robin of the Hopi Tribe stated it succinctly:

> A . . . disturbing factor is . . . that the ICP may pull out of providing consistent and regular visits to Indian communities without first taking the both logical and etiquette approach of consulting with these communities *before* redirecting its emphasis. . . . Trust is such a difficult commodity to establish, and I would hate to see it cast aside so readily, especially being aware of the long trail of broken commitments that preceded the Indian Children's Program. R. 70, Exh. 7 (Exh. 44)

2. Prior Agency Actions And Rules Establishing Eligibility

a. Agency Representations to Congress Regarding the ICP

Following enactment of the IHCIA in 1976, IHS presented to Congress its plan that the ICP would provide diagnostic and therapy services to handicapped Indian children. *Approp. for 1978, House*, 95th Cong., 1st Sess., pt. 4, 182-183. The IHS plan was in direct response to the Congressional provisions for "therapeutic and residential

treatment centers" in Title II of the IHCIA. Each year thereafter, the IHS Director told Congressional appropriations committees that IHS was funding the ICP in order to pursue a policy of providing services to handicapped Indian children through the ICP, describing those services, their importance, and identifying those eligible to receive them.[12] These annual representations were part of IHS effort to obtain continued funding for its programs, including the ICP, as well as in response to questions from the Congressional committees asking about the activities of the ICP, the success it was having, and whether it would be continued. These representations and the exchanges between the IHS Director and the committees evince not only a Congressional interest in the ICP, but an intent that it continue.

This history of IHS representations to Congress as part of its appropriations process regarding the agency is relevant as "law to apply" for purposes of judicial review. *International Union, United Auto., Aerospace v. Donovan*, 746 F.2d 855 (D.C.Cir. 1984). Questions regarding the federal responsibility for Indian health care "must be answered in terms of congressional intent and the federal government's overriding trust responsibility." *McNabb v. Bowen*, 829 F.2d 787, 793 (9th Cir. 1987). These representations are primarily relevant here, not in terms of how Congress "required [the agency] to behave," *International*

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[12] *See, e.g., Approp. for 1980 House*, 96th Cong., 1st Sess., pt. 8, at 245; *Approp. for 1980, Senate*, 96th Cong., 1st Sess., pt. 2, at 1544-45; *Approp. for 1981, House*, 96th Cong., 2d Sess., pt. 11, at 218; *Approp. for 1982, House*, 97th Cong., 1st Sess., pt. 9, at 70-74; *Approp. for 1983, House*, 97th Cong., 2d Sess., pt 3, at 167; *Approp. for 1984, House*, 98th Cong., 1st Sess., pt. 3, at 351.

Union at 860, but in terms of how the agency itself decided to behave. These representations document and establish the "existing law, policy or practice" from which the agency could not depart without complying with APA procedures. *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343, 1351 and n. 6 (10th Cir. 1987). An agency "policy or practice" provides law which can be used to judge the agency's departure therefrom. *Robbins v. Reagan*, 616 F.Supp. 1259 (D.D.C. 1985) *aff'd* 780 F.2d 37 (D.C. Cir. 1985). Agency representations to Congress are a part of the appropriations history which is relevant and may be referred to "for guidance in determining the proper rules for providing Indian health assistance." *McNabb v. Bowen*, 829 F.2d 787, 793, note 6 (9th Cir. 1987); *Morton v. Ruiz*, 415 U.S. 199 (1974). Thus, in determining the propriety of a BIA termination of general assistance benefits to Indians living off, but near an Indian reservation, the Court noted:

> [e]ven more important is the fact that, for many years, to and including the appropriations year at issue, the BIA itself made continual representations to the appropriations subcommittees that nonurban Indians living "near" a reservation were eligible for BIA services. *Id* at 214.

b. The Government's Administrative Policy Of Providing Services To Handicapped Indian Children Through the ICP

Following the enactment of the Indian Health Care Improvement Act in 1976, until the program was terminated in 1985, the IHS pursued a policy of providing handicapped Indian children with direct evaluation and

treatment services through the ICP. The services provided throughout the existence of the ICP consistently addressed the need to identify and diagnose handicapped Indian children, plan and monitor their treatment plans, and ensure that they received the therapy and treatment they needed. Throughout its existence, the ICP was specific in its organizational structure, location, funding, and staffing, as well as its services. The decision to terminate the ICP drastically altered this policy. An administrative policy which is consistently followed over a period of time provides "law to apply" in reviewing the agency's exercise of discretion. *Franklin v. Massachusetts*, 505 U.S. ___, 120 L.Ed.2d 636, 662 (1992) (Concurring Opinion). Here, the "statutory framework and the long held administrative tradition," *Id.*, for the provision of services to handicapped Indian children through the ICP, all set against the backdrop of "the federal government's overriding trust responsibility to Indians," provide a judicially administrable standard of review. *McNabb v. Bowen*, 829 F.2d 787, 793 (9th Cir. 1987). In addition, "it can be presumed that [Congress] intends that the agency make its [funding] allocation based on factors solely related to the goal of implementing the stated statutory purposes in a reasonable fashion." *Robbins v. Reagan*, 780 F.2d 37, 48 (D.C. Cir. 1985). "Once an agency has declared that a given course is the most effective way of implementing the statutory scheme, the courts are entitled to closely examine agency action that departs from this stated policy." *Id.* at 45, citing *Mot. Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-44 (1983). Thus, "an agency's change in direction from a previously

announced intention is a danger signal that triggers [judicial] scrutiny." *Robbins v. Reagan*, 780 F.2d 37, 48 (D.C. Cir. 1985).

c. Agency Eligibility Rules

Under eligibility rules established by the agencies, ICP services were available to any otherwise IHS or BIA eligible handicapped Indian child from birth through 21 years. Pet. Reply App. 1a-2a. Under IHS eligibility regulations applicable at the time of the ICP termination, its services "will be made available" to "persons of Indian descent." 42 C.F.R. 36.12(a) (1986) These eligibility rules provided that the services that "will" be made available "depend upon the facilities and services available from sources other than the Service and the financial and personnel resources made available to the Service." 42 C.F.R. 36.11(c) (1986).

Under these rules, the children were clearly eligible for continued ICP services to the point the ICP termination decision was announced. Thereafter, however, they were no longer eligible for the direct services they had been receiving. However, nothing had changed in the eligibility situation. The children were still in need of the crucial services provided by the ICP, the ICP staff remained intact and capable of continuing those services, and the funding for the ICP remained unchanged. R. 70, Exh. 3, No's 18-19. Since the need, the staff assembled to meet the need, and the Congressional funding provided for the program remained, nothing about the "financial and personnel resources *made available to the Service*" had changed. The only change was a change in IHS policy to redirect the focus of the ICP. Since the ICP services the

children had been receiving continued to remain "available", the eligibility rule that "[s]ervices *will* be made available . . . to persons of Indian descent" required that IHS continue providing these ICP services to them.

Furthermore, even assuming that "funds, facilities, or personnel [we]re insufficient to provide [continuing ICP direct] services," the "[p]riorities for care and treatment, as among individuals who are within the scope of the program, will be determined on the basis of relative medical need and access to other arrangements for obtaining the necessary care." 42 C.F.R. 36.12(c) (1986). This rule requires a factual assessment of the need for care and treatment, the urgency of this need, and the actual availability of other resources to provide this care and treatment. IHS failed to meet these requirements before discontinuing ICP services to the children.

d. The Indian Health Service Manual

The IHS Manual provides further law to apply. Most pertinent are provisions in Chapter 13 of the Manual which specify policies, procedures and services applicable in the areas of maternal and child health and mental health programs. Resp. App., 10a-16a. The IHS Manual specifically addresses services that are to be provided to handicapped children and the manner in which they are to be provided. Chapter 13, Section 3-13.6(A) states that "this section sets forth the IHS . . . responsibilities . . . for meeting specific health needs of infants and children." It thereafter requires that "services must be provided that will emphasize the importance of preventing handicapping conditions or preventing the extension of existing

conditions." *Id.* The specific handicapped issues to be addressed by these services include early identification of defects (to ensure a comprehensive screening and individual education plan) and management (to ensure long-term treatment and coordination of referral and follow-up services). *Id.*

If these services sound familiar it is because they are virtually identical to those provided by the ICP. In effect, IHS used the ICP as the vehicle to provide those services its Manual required it to provide to handicapped Indian children. Thus, the Manual expresses the interpretation of the IHS regarding the duties it was obligated to undertake pursuant to its mandate to provide health care services to the Indian people.

3. The Obligations of the Federal Government's Special Relationship to Indians For Their Health Care

Congress and the courts have recognized that the legal responsibilities of the special relationship between the federal government and the Indian people apply in the context of Indian health care. IHCIA, 25 U.S.C. 1602; *McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987); *White v Califano*, 437 F.Supp. 543 (D.S.D. 1977) *aff'd* 581 F.2d 697 (8th Cir. 1978). The IHCIA was specifically enacted so that the United States could fulfill "its special responsibilities and legal obligations to the American Indian people." 25 U.S.C. 1602. 1601(a) provides that

> Federal health services to . . . Indians are consonant with and required by the Federal Government's historical and unique legal relationship

with, and resulting responsibility to, the American Indian people.

Although the government argues that it is only constrained by this "trust" responsibility when it deals with Indian property, Govt. Brief at 22, Congress made clear through 1601(a) and 1602 that the government provides Indian health care as a direct result of this special relationship. In effect, Congress admitted for the IHS that the "trust" responsibility applies to its provision of health care. Moreover, IHS itself recognized that it provided health services to Indian people pursuant to the "trust" relationship. *Approp. for 1981, Senate*, 96th Cong., 2d Sess., pt. 1, at 836.

C. The Agency's Unjustified Factual Assumption That Alternative Sources Would Provide the Children with The Same Services They Had Been Provided By the ICP After The ICP Was Terminated Provides A Basis For Judicial Review.

Judicial review is also required because the children claimed the agency action was arbitrary and capricious because based on an unjustified factual assumption. Where an agency action is alleged to lack an adequate factual basis or is alleged to be contrary to the evidence before the agency, the action can be determined arbitrary. *See, e.g., Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 630-636 (1986) (Rules prohibiting hospitals from withholding treatment to handicapped infants despite parental objection set aside because they lacked an adequate factual basis); *Mot. Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (Rule is arbitrary if

agency's "explanation for its decision . . . runs counter to the evidence before the agency.") In such situations, even if there is no law to apply to determine how the agency *must* use its discretion, it is clear that there are accepted ways it *must not* use it. R. Levin, 74 Minn. L. Rev. 689, 715.

The children alleged that services alternative to those provided by the ICP were not available from the IHS or any other source. J.A. 12-13. Nevertheless, Dr. Kreuzberg, the IHS official who made the decision to terminate the ICP, was not aware that alternative services were not actually available. Instead, he incorrectly assumed that the children would continue to receive from other sources the same services they had been receiving from the ICP. Kreuzberg Depo., pp. 72-73, 81, 87, 90-91, 95, 107-108; Depo. Exh. 12. This inadequate and unjustified factual basis for the decision to terminate the ICP renders the action arbitrary and provides a separate basis for judicial review.[13]

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[13] IHS regulations required that any determination of what services IHS would provide in a particular area would depend in part "upon the facilities and services available from sources other than the Service." 42 C.F.R. 36.11(c) (1986). Thus, the nonexistence of alternative resources is directly relevant in determining the propriety of the ICP termination.]

CONCLUSION

The judgment of the court of appeals should be affirmed.

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No. 91-1833

In the Supreme Court of the United States

OCTOBER TERM, 1992

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, ET AL., PETITIONERS

v.

GROVER VIGIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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REPLY BRIEF FOR THE PETITIONERS

1. Respondents defend the court of appeals' holding that there is judicially manageable "law to apply" for reviewing resource allocation decisions by the Indian Health Service (IHS), and that the IHS's allocation of funds received through lump-sum appropriations among its several statutory functions is accordingly not "committed to agency discretion by law." 5 U.S.C 701(a)(2).

a. As we explain in our opening brief (Pet. Br. 14-15), the Snyder Act and the Indian Health Care Improvement Act (IHCIA) do not provide "law" for a court "to apply" so as to permit it to review and set aside the resource allocation decision at issue in this

case. No such law can be found in the Snyder Act's general authorization for the IHS and the BIA to expend funds for the "benefit, care, and assistance of * * * Indians," 25 U.S.C 13, or in the IHCIA's general policy provisions, 25 U.S.C. 1601, 1602,[1] or in its provision authorizing "therapeutic and residential treatment centers," 25 U.S.C. 1621(a) (4)(D). Neither statute provides any guidance whatever concerning how the IHS was supposed to allocate its resources between fulfilling the needs of handicapped Indian children in the Southwest and meeting health care needs of those and other Indians elsewhere in the country. Although we may assume, *arguendo*, that the Snyder Act and the IHCIA would provide "law to apply" to the extent of permitting a court to review a decision by the IHS to spend funds on a purpose *not* authorized by either statute (*e.g.*, to establish a health program for non-Indians),[2] those statutes provide no standard for determining how the IHS was to allocate its resources among authorized purposes for the benefit of Indians.[3]

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[1] Cf. *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 19 (1981) (A "general statement of 'findings' * * * is too thin a reed to support * * * rights and obligations read into it.").

[2] There could be no serious contention that the purpose to which the funds previously allocated to the ICP were reallocated—to provide technical assistance and consulting services to IHS components on a nationwide basis—is not authorized by the Snyder Act or the IHCIA.

[3] Contrary to respondents' contention (Br. 34-36), the ICP could not in any event have been mandated by the IHCIA's authorization for "residential treatment centers," since the Indian Children's Project (ICP) included no such centers. See Pet. 6-7. As the court of appeals observed, the program was "created at the discretion of the IHS," not to fulfill any statutory mandate. Pet. App. 11a.

In an effort to overcome the generality of the statutory text, respondents assert (Br. 32) that laws "must be interpreted in such a way as to favor, rather than restrict, judicial review under the APA" because "[s]tatutes enacted to benefit Indians must be liberally construed in their favor." While this Court has long held that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed [with] doubtful expressions being resolved in favor of the Indians," *Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78, 89 (1918), that canon of construction does not aid respondents here for two reasons.

First, that canon does not give rise to a special rule permitting judicial review in the Indian context of governmental actions or funding decisions that would otherwise not be subject to judicial review. To the contrary, governmental matters affecting Indians have traditionally been regarded as *less* amenable to judicial oversight. See, *e.g.*, *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 84-85 (1977); see also *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 411-416 & n.28 (1980); *Baker* v. *Carr*, 369 U.S. 186, 215-216 (1962); cf. *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655-656 (1976).

Second, there is in any event no ambiguity in the statutes involved with respect to the issue here: the statutes are unambiguously broad, general, and devoid of standards that might guide a court in reviewing the IHS's decisions concerning the allocation of appropri-

ated funds among authorized purposes—and therefore are precisely the sort of statutes that commit the matters they encompass to agency discretion. Accordingly, a directive to construe either the Snyder Act or the IHCIA "in favor of the Indians" would still leave a reviewing court with no judicially manageable standard for determining the appropriateness of the IHS's decision to reallocate funds from the ICP, which benefits Indian children in the Southwest, to benefit Indians in communities across the nation.

b. Respondents' attempt (Br. 41-42, 45) to find law to apply in the IHS's regulations also fails. The regulations cited by respondents provide that the IHS services offered at any location depend on the "financial and personnel resources made available," 42 C.F.R. 36.11(c) (1986), and that priorities for care and treatment are "determined on the basis of relative medical need and access to other arrangements." 42 C.F.R. 36.12(c). Respondents contend that those regulations provide a standard by which a court may assess a claim that the agency ought to have allocated its resources differently among authorized purposes. Specifically, they argue (Br. 42) that a court should "assess[] * * * the need for care and treatment, the urgency of this need, and the actual availability of other resources to provide this care and treatment." Presumably, the court would also have to perform the same assessments for all competing uses of the same resources. The mere statement of the factors involved and judgments to be made is sufficient to demonstrate that the task of allocating scarce agency funds is a matter for the expert agency that Congress has charged with administering the Indian Health program, not the courts.

Not surprisingly, as we explained in our opening brief (Pet. Br. 24-26), both this Court and the lower federal courts have uniformly held that resource allocation decisions are committed to agency discretion because "they involve the inherently subjective weighing of the large number of varied priorities which combine to dictate the wisest dissemination of an agency's limited budget." *Community Action of Laramie County, Inc.* v. *Bowen*, 866 F.2d 347, 354 (10th Cir. 1989). This Court should not accept respondents' invitation to turn the federal courts into health care administrators.

c. The IHS Manual provisions relied on by respondents (Br. 42-43) do not mandate or even mention the ICP, and plainly do not provide law to apply to the agency decision to terminate the ICP. The regulation that describes the IHS Manual, 42 C.F.R. 36.3 (1986), explains that it consists only of operating procedures to assist officers and employees in carrying out their responsibilities. The regulation further explains that those operating procedures "are not regulations establishing program requirements which are binding upon members of the general public." *Ibid.*[4]

[4] Although the Court referred to the BIA manual in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), it did so for a purpose that is precisely the opposite of that invoked by respondents here. The Court in *Ruiz refused* to give deference to a BIA eligibility requirement that was published in the BIA manual, at least in part because the Manual was, "by BIA's own admission, solely an internal-operations brochure intended to cover policies that 'do not relate to the public.'" 415 U.S. at 235.

Significantly—despite respondents' urging—neither the district court nor the court of appeals held that the IHS Manual provisions furnish law to apply in this case.

d. Respondents argue (Br. 37-41) that "agency representations to Congress" and "administrative policy" provide law to apply in this case, and cite *Morton* v. *Ruiz*, 415 U.S. 199 (1974), as support for that proposition. In *Morton* v. *Ruiz*, this Court treated as significant the fact that BIA had indicated in appropriations hearings that Indians living near, but not on, a reservation were eligible for BIA Services. *Id.* at 214. The Court, however, did not treat those representations as binding law or otherwise hold that they controlled the BIA's exercise of discretion. Instead, the Court relied on those representations, along with other indications of legislative intent, to illuminate ambiguous statutory language regarding an issue—eligibility requirements for certain BIA benefits—that had never been regarded as committed to agency discretion by law. See *id.* at 210-230. In this case, by contrast, respondents do not rely on statements in congressional testimony as an aid to construing statutory language; they instead seek to elevate such statements to the status of law in themselves—as a *substitute* for statutory language—to govern the IHS's resource allocation decisions.[5]

[5] In *McNabb* v. *Bowen*, 829 F.2d 787 (9th Cir. 1987), as in *Morton* v. *Ruiz*, the Ninth Circuit used agency statements and congressional committee reports to assist in clarifying a statutory ambiguity: whether the IHS could require Indians to seek help from state agencies before making use of IHS services. That is not analogous to using similar materials to

Neither agency statements to Congress nor committee reports, however, constitute legally binding authority. Cf. *INS* v. *Chadha*, 462 U.S. 919 (1983); *International Union, UAW* v. *Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 474 U.S. 825 (1985).[6]

Respondents also err in contending (Br. 39-40) that the government's administrative "policy of providing handicapped Indian children with direct evaluation and treatment services" provides law that a court may apply to review and set aside the IHS decision. There was no such "policy." The ICP was a pilot program that provided services for a few years to Indian children only in a few southwestern States. By contrast, the administrative policy that four Members of this Court suggested might provide law to apply in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992), cited by respondents (Br. 31, 40), had guided the Secretary's exercise of discretion since 1790, and

impose legally binding obligations on an agency concerning how to allocate its resources among various statutorily authorized purposes.

[6] Amici Six American Indian Tribes *et al.* assert (Br. 10-21) that *Donovan* is distinguishable because this case involves the special relationship between the federal government and Indian tribes and because the legislative history in *Donovan* is asserted to be less clear than that relied on here. As we explained in our opening brief (Pet. Br. 21-24), however, the special relationship between the United States and Indian tribes possesses no independent legal force that would furnish a basis for judicial review of agency allocation decisions. And the holding in *Donovan* that legislative history does not provide law to apply was not based on the quantity or clarity of the documents cited to the court in that case. 746 F.2d at 860-861.

the case for reviewability was bolstered, in the view of those Justices, by the special role of the census in preserving the Nation's commitment to a democratic form of government. See 112 S. Ct. at 2785 (Stevens, J., concurring in part and concurring in the judgment) (discussing the "usual residence" rule). More importantly, however, the concurring opinion in *Franklin* v. *Massachusetts* did not rely on the existence of the administrative policy standing alone; it found law to apply in the "overall statutory scheme," specifically noting that "the Secretary's discretion is constrained by the requirement that she produce a tabulation of the 'whole number of persons in each State.' 2 U.S.C. 2a." 112 S. Ct. at 2785. Thus, the administrative policy (the "usual residence" rule) involved in *Franklin* v. *Massachusetts* served as a source of guidance in determining which persons could be regarded as "in" each State within the meaning of the governing statute, 112 S. Ct. at 2785 n.20 (Stevens, J., concurring in part and concurring in the judgment), and the Constitution, *id.* at 2777-2778 (majority opinion). Here, by contrast, the IHS's funding of the ICP for a period of time furnishes no guidance to a court in construing either the Snyder Act or the IHCIA for purposes of reviewing the IHS's decision to reallocate appropriated funds from the ICP to another purpose that is equally authorized by those Acts.

Petitioners' claim concerning the IHS's "policy" in fact reduces to the contention that, once an agency has decided to allocate its resources in a certain way, it must continue to do so—or at least be prepared to justify to a court any change it makes. That claim is

inconsistent with the numerous cases holding that resource allocation decisions of the sort involved here are committed to agency discretion by law. See Pet. Br. 24-25 & n.16.

Nor does the D.C. Circuit's opinion in *Robbins* v. *Reagan*, 780 F.2d 37 (1985), aid respondents. See Resp. Br. 39. In that case, the court found that it could review an agency's decision to close a homeless shelter, because the plaintiff alleged that the agency decision stemmed from an impermissible factor—animosity toward a homelessness advocacy group. *Id.* at 47. The court held that the question of whether there exists law to apply "focuses on the particular allegations of the plaintiff." *Ibid.* Here, by contrast, the respondents have never alleged that the IHS decision was based on impermissible or irrelevant factors.[7]

e. Finally, respondents contend (Br. 43-44) that a "trust" relationship applies to the "provision of

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[7] Respondents do contend (Br. 44-45), for the first time, that the IHS decision to terminate the ICP was based on an "unjustified factual assumption that alternative sources" of services would be available and that this assumption provides a "basis for judicial review." The record shows that the regional ICP was ended in order to allocate its resources to a program that would benefit children nationwide. Pet. App. 20a; J.A. 72, 77, 80, 90. While the alternative resources available to respondents would be one factor relevant to the decision, the decision was made on the basis of a variety of other considerations as well. Thus, even if the agency had underestimated the availability of alternative sources of health care—and we do not believe that it did—that fact alone would not provide a "meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985).

health care," and that that trust relationship justifies judicial review of the IHS's resource allocation decisions. In our opening brief, we explained (Pet. Br. 21-24) that the government's trust duty to Indians is implicated only where Indian property or Indian funds are at stake, and that the contours of the relationship are supplied by the statutes and regulations relevant to the property at issue.[8]

Respondents rely (Br. 43-44) on the Congressional findings provision of the IHCIA for the proposition that a trust responsibility applies to the provision of

[8] Amici NCAI, *et al.*, contend (Br. 8) that two of the cases we cite for this proposition–*Scholder* v. *United States*, 428 F.2d 1123 (9th Cir.), cert. denied, 400 U.S. 942 (1970), and *Quick Bear* v. *Leupp*, 210 U.S. 50, 80-81 (1908)—"are easily distinguished from the present case" because most contemporary Indian health and education programs are funded through general appropriations and not treaty funds. That argument misses the point. General appropriations are not Indian tribal trust funds to which a trust relationship attaches. Trust funds are monies that belong to the tribe and are derived from the sale of tribal resources, from treaties, from the proceeds of tribal labor, and from claim judgments rendered against the United States. See Newton, *Indian Tribal Trust Funds*, 27 Hastings L. J. 519, 522 (1975). The fact that many services are now provided by general appropriation instead of by treaty right does not alter the fact that there is a difference between public monies and tribal funds managed by the United States as trustee. *Scholder*, 428 F.2d at 1129. As a result, far from supporting a special rule of judicial review in this setting, the fact that federal services to Indians now are funded out of the same type of lump-sum appropriations that fund the operation of the government generally supports our position that here, just as in the case of programs not involving Indians, the allocation of lump sum appropriations among authorized agency programs is committed to agency discretion by law.

health care. Rather than providing "trust" law to apply, however, the provisions of the IHCIA quoted by the respondents illustrate a point we made in our opening brief. See Pet. Br. 23. In enacting the IHCIA and the Snyder Act (and annual appropriations authorized by those Acts)—and in vesting broad discretion in the IHS and BIA—Congress articulated its view of both the nature of the "special relationship" between the United States and Indians in this context and the manner in which that relationship should be carried out. Thus, although the "special relationship" may have provided the rationale for Congress's decision to provide for Indian health care, it does not furnish an independent, extra-statutory basis for imposing legal constraints on the IHS's allocation of resources among various Indian health needs. See Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213, 1246 (1975). Indeed, respondents all but concede this fact through their failure to explain precisely what constraints the "trust" responsibility they invoke might impose on the IHS.

Amici Six American Indian Tribes, *et al.*, contend (Br. 11-13) that the "trust" responsibility is not limited to the administration of trust property. In support of that proposition, amici cite statements in *Pyramid Lake Paiute Tribe of Indians* v. *United States Dep't of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) ("trustee obligations apparently are not limited to property"), and in R. Strickland, *et al.*, *Felix S. Cohen's Handbook of Federal Indian Law* 226 (1982) [hereafter *Handbook*] ("Court decisions have also held that the ordinary standards of a private fiduciary

must be adhered to by executive officials administering Indian property or federal programs"). In turn, both sources cite this Court's decision in *Morton* v. *Ruiz*. As we explain below and in our opening brief (Pet. Br. 37-38), the actual holding in *Ruiz* does not support such a remarkable expansion of the "trust" responsibility. If read to embody respondent's conclusion, *Ruiz* would be inconsistent with this Court's later decisions in *United States* v. *Mitchell*, 463 U.S. 206, 224 (1983), and *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 707-708 (1987).[9]

2.a. In our opening brief (Pet. Br. 29-34), we demonstrated that under this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), agency decisions concerning the discretionary allocation of funds are not subject to the procedural requirements that govern promulgation of legislative rules.[10] Respondents assert (Br. 25) that

[9] Indeed, the statement from the *Handbook* cited by respondents appears to be wholly derived not from the language of *Ruiz* itself, but from Professor Davis's analysis of the case in an article published shortly after the decision. See *Handbook* 225 n.78 (discussing Davis, *Administrative Law Surprises in the Ruiz Case*, 75 Colum. L. Rev. 823 (1975)). That article likewise predated this Court's decisions in *Mitchell* and *Cherokee Nation*.

[10] Respondents' discussion (Br. 19-24) of the differences between "interpretative" and "substantive" rules is of little consequence in this case. As we noted in our opening brief (at 33 n.19), the government did not argue in the court of appeals that the IHS's resource allocation decision was an "interpretative" rule that was, on that basis, exempt from APA notice-and-comment rulemaking procedures. See 5 U.S.C. 553(b)(3)(A).

the instant case differs from *Overton Park* because the IHS decision—unlike the decision at issue in *Overton Park*—involved a change in general "eligibility rules." Specifically, respondents assert (Br. 6, 23) that an informational brochure "promulgated eligibility criteria" concerning "who [was] eligible for ICP services."

Respondents' assertion is mistaken. The brochure relied on by respondents merely explained that the ICP was a "regional * * * evaluation, treatment planning, consultation and training program" that would "see any IHS or BIA/OIEP [Office of Indian Education Programs] eligible child." Pet. Reply Br. App. 1a (Certiorari Stage). The brochure was designed "to help people in the regional referral area understand the functioning of the ICP," *ibid.*, and not to "promulgate" eligibility rules. Rather than creating new eligibility standards, the brochure simply referred the reader to existing standards governing eligibility for IHS services generally. *Ibid.*

More generally, respondents suggest (Br. 23-24) that the decision to terminate the ICP was in some sense a modification of "eligibility criteria" for ICP programs. However, the standards governing eligibility for IHS programs (including the ICP), see 42 C.F.R. 36.12 (1986), were not affected either by the decision to begin the ICP as a pilot project or to terminate it and reallocate funds to other purposes.[11]

[11] Thus, respondents' reliance (Br. 23) on *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), is misplaced. That case requires that an agency's repudiation or rescision of an extant rule must go through notice and comment rulemaking. See also *Homemakers North*

As a result, the Indian children who participated in the ICP program remained eligible for IHS health care services after the program was terminated. Although the IHS regularly alters the mix of health services offered at given locations—as its regulations provide, see 42 C.F.R. 36.11(c) (1986)—each such decision does not redefine "eligibility criteria" for receipt of IHS services.

Nor does each IHS decision altering the mix of available health services at a particular location constitute a "rule" under the APA in any other respect. Respondents essentially argue that the facts that the IHS decision reallocating funds from the ICP was communicated in verbal form and that it had an impact on the participants in the program were sufficient to bring it within the APA definition of "rule." Under the APA, however, "a rule is a statement that has *legal* consequences" in the future because it "deals with what the law will be." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 218-219 (1988) (Scalia, J., concurring) (emphasis added). In this case, it was the reallocation of resources itself—not any verbal statements the IHS made—that had a future effect, and that reallocation did not prescribe or affect any legal rights or duties of either the IHS or respondents. See Pet. Br. 30-31. Under any other view, virtually everything an agency does would be a rule. See Pet. Br. 32-33. Respondents do not deny

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Shore, Inc. v. *Bowen*, 832 F.2d 408, 412 (7th Cir. 1987). Neither the creation nor the termination of the ICP constituted rulemaking, and the Court's holding in *Motor Vehicle Mfrs. Ass'n* is thus not implicated here.

that that would be the effect of adopting their open-ended interpretation.

b. Respondents argue (Br. 27-28) that this Court's decision in *Morton* v. *Ruiz*, coupled with the concept of the government's "special relationship to Indians," imposes a special procedural requirement on the government to engage in notice-and-comment procedures before terminating services to Indians. As we explained in our opening brief, however, the decision in *Ruiz* cannot be taken to stand for such a broad principle. See Pet. Br. 37-38. To do so would disregard the crucial fact in the *Ruiz* decision—that the agency's own rules required it to publish its eligibility requirements. It would also disregard this Court's later decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978). *Vermont Yankee* made clear that a court's duty in reviewing agency procedures is simply to determine whether the agency has complied with the applicable statutes and regulations, not to impose special procedural requirements on the agency based on the court's own notions of what procedures would be most desirable.

Respondents assert that this case is not subject to the rule of *Vermont Yankee*, because it presents "extremely compelling circumstances." See Br. 18 (quoting 435 U.S. at 543). The decision to terminate the ICP, however, falls well short of the "extremely rare," 435 U.S. at 524, situation in which a court might permissibly fashion procedural constraints on agency action that are not required by statute or regulation. The agency decision at issue was not a "quasi-judicial determination by which a very small

number of persons [were] exceptionally affected, in each case upon individual grounds." *Vermont Yankee*, 435 U.S. at 542 internal quotation marks omitted). Imposition of rulemaking procedures in the instant case would only interfere with the prompt provision of health care to Indian communities throughout the nation. If "compelling circumstances" mandate rulemaking in this case, they would also compel rulemaking whenever the IHS reallocates its staff or varies the procedures and equipment made available to any of its 50 hospitals, 158 health centers, or 300 health stations. The net result could only be delay in the allocation of scarce resources while courts attempt to micromanage health care delivery.

Despite respondents' claims (Br. 26), the "good cause" exception to APA notice-and-comment rulemaking, see 5 U.S.C. 553(b)(3)(B), would not mitigate the adverse effects of this delay. First, as we show in our opening brief (Br. 31-34), agency resource allocation decisions are simply not rules. Therefore, the APA's rulemaking requirements, as well as the exceptions thereto, do not apply. Second, the "good cause" exception is applied narrowly. See, *e.g.*, *Action on Smoking and Health* v. *CAB*, 713 F.2d 795, 800 (D.C. Cir. 1983). Were the IHS to apply that exception to the myriad decisions it must make in allocating its health care and delivery resources, however, there would be little basis for distinguishing those that could be implemented under the "good cause" exception from those that could not, and the exception might quickly swallow the rule. Moreover, litigation concerning the applicability of the exception in particular cases would in itself disrupt the efficient operation of the IHS's programs.

3. Respondents contend (Resp. Br. 28-29) that the relief granted below must be affirmed on the basis of what they assert to be the district court's unappealed holding that the agency's decision to terminate the ICP was a "statement[] of general policy" that the agency did not publish in accordance with the requirements of 5 U.S.C. 552(a)(1).

Respondents advanced a similar argument in their brief in opposition (at 6). As we explained in our Reply Brief at the certiorari stage (at 2-3), the district court's ruling that the decision to terminate the ICP was invalid under 5 U.S.C. 552 would not provide an independent ground on which to affirm the judgment below. That ruling rested entirely on the district court's prior determination that the decision was a "rule" subject to Section 553's notice-and-comment procedures. See Pet. App. 41a ("[t]he centrally relevant finding here has already been made with respect to the rulemaking requirements of § 553"). Indeed, the district court expressly held (Pet. App. 38a) that the IHS decision did not come within the exception to notice-and-comment rulemaking requirements for "general statements of policy." 5 U.S.C. 553(b)(3)(A). And the respondents have never alleged that the decision was anything other than a rule. See J.A. 14-15; Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment 28-31.

Had the court of appeals agreed with petitioners that the termination decision was not a rule at all, it would have been required to reverse the district

court's judgment, including its finding of a Section 552 violation. Since the district court's Section 552 ruling rests on the same erroneous premise that led both courts below to impose notice-and-comment procedures, Section 552 does not provide an independent basis for affirming the judgment below.

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

WILLIAM C. BRYSON
Acting Solicitor General

JANUARY 1993

No. 91-1833

In The

Supreme Court of the United States

October Term, 1992

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, *et al.*,

Petitioners,

vs.

GROVER VIGIL, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN COUNCIL ON AGING, NORTHWEST AREA INDIAN CHILD WELFARE ASSOCIATION IN SUPPORT OF RESPONDENTS

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Pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, the National Congress of American Indians, 900 Pennsylvania Ave., S.E., Washington, DC 20003; the Northwest Area Indian Child Welfare Association, c/o Regional Research Institute, P.O. Box 751, Portland, OR 97207; and the National Indian Council on Aging, 6400 Uptown Blvd., N.E., City Center 510W, Albuquerque, NM 87110 file the attached brief *amici curiae* in support of Respondents to the above-captioned case. Both parties have consented in writing to the filing of this brief; said letters of consent accompany this brief, as required by Rule 36.

INTEREST OF *AMICI CURIAE*

The National Congress of American Indians is dedicated to protecting the rights and improving the welfare of American Indians and Alaska Natives, to enlightening the public toward a better understanding of Indian people, and to preserving rights under Indian treaties or agreements with the United States. NCAI is the oldest and largest national organization of Indian governments and individuals in the United States. NCAI routinely files briefs *amicus curiae* in Supreme Court cases.

The National Indian Council on Aging, a non-profit organization, is the Nation's foremost advocate for Indian elders, dedicated to improvement of the lives of America's 200,000 American Indians and Alaska Native elders, and preservation of the federal trust duty owed to them.

The Northwest Indian Child Welfare Association, Inc. is an organization, the primary goals of which are to provide tribal social service professionals with training and information that can enhance their practice; to facilitate community prevention efforts in tribal communities centered around protecting and nurturing Indian children; and to increase access to a broad range of services for Indian children and families.

Amici Curiae have two general concerns about the impact of *Rhoades v. Vigil*. First, there is the potential for the future arbitrary termination of services to some of the Indian community's neediest children. With the current federal response to the needs of Indian children and families being woefully inadequate, a court decision with the potential to exclude more Indian children from desperately needed services is unconscionable. The second concern focuses on the impact of the overall trust responsibility that the United States government has to Indian people. This trust responsibility has been well defined in treaty, law, and federal administrative policy. The Indian Health Service's decision to discontinue services to these handicapped children could abrogate this trust responsibility and, if upheld, could set a dangerous precedent for future efforts to enforce the trust responsibility.

SUMMARY OF ARGUMENT

The Supreme Court has ruled in several instances that the United States' trust relationship imposes a duty of fairness on the government's dealings with Indian people. Respondents in this case contend, and the Tenth Circuit has ruled, that a duty of fairness requires the United States to consult with them before terminating the Indian Childrens Program (ICP), a program benefitting severely mentally, physically and emotionally handicapped Indian children. The government disagrees, on the grounds that, first, the federal trust duty extends only to matters involving Indian property and, second, that Congress has never passed a statute expressly creating the ICP and, thus, Respondents do not have a legitimate expectation to be consulted.

Amici believe the government is wrong on both of these points. First, through numerous decisions of the Court *and* congressional enactments it is clear that both the United States and Indian people understand the trust duty – and hence the duty of fairness – extends beyond

matters involving only property. Second, there is an unambiguous history, spanning nearly two centuries, evincing a self-imposed trust duty on the government to deliver health care to Indian people. These factors combine to produce a legitimate expectation in Respondents to be consulted in the ultimate decision by the government whether to terminate the ICP.

ARGUMENT

I. THE UNITED STATES BEARS A TRUST RESPONSIBILITY TO PROVIDE HEALTH CARE TO INDIAN PEOPLE WHICH DERIVES FROM TWO CENTURIES OF THE UNITED STATES' SELF-IMPOSED OBLIGATION

A. The United States Has a Distinct Obligation, Growing Out of Two Centuries of History, to Deal Fairly With Indian People in the Delivery of Health Care Services.

Generally speaking, the federal trust responsibility doctrine has been developed by the Supreme Court and lower federal courts over the past one hundred and seventy years to explain the unique status of Indian tribes and their members and their unique relationship to the United States government.[1] The doctrine is intended to protect Indians whose lives are inextricably intertwined with – and thus dependent upon – the federal government, as is the situation in the case presently before the Court.

The earliest judicial pronouncements of the trust relationship between Indian tribes and the United States came in the 1823 and 1831 decisions of *Johnson v.*

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[1] Chambers, Reid Payton, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stanford Law Review 1213, 1215-1234 (1975); Cohen, *Handbook of Federal Indian Law* (Michie Bobbs-Merrill 2d ed. 1982) at 220.

M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), and *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), now cornerstones of federal Indian law.[2] In those cases Chief Justice John Marshall described the status of Indian tribes as "domestic dependent nations",[3] an intermediate governmental status more sovereign than states, but less sovereign than foreign nations. Chief Justice Marshall explained the tribes' relationship to the federal government as being "that of a ward to his guardian."[4] The guardian-ward, or trust, relationship between the United States and Indian tribes and tribal members has remained at the core of federal Indian law.[5]

In the seminal decision *Morton v. Ruiz*, 415 U.S. 174, 236-7 (1974), this Court reiterated the "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people," (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)), and found that this distinct obligation of trust compelled an "overriding duty of our Federal Government to deal fairly with Indians. . . . " (quoting *Seminole Nation* and *Board of County Commissioners v. Seber*, 318 U.S. 705 (1943)). The Court in *Seminole Nation* had previously described the trust duty as "humane and self-imposed"; that by virtue of "many acts of Congress and numerous decisions of this Court," the United States has "charged itself with moral obligations

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[2] Chambers, *id.*; Cohen at 221.

[3] Cherokee Nation v. Georgia, *supra*, 30 U.S. (5 Pet.) at 16-17.

[4] *Id.*

[5] United States v. Kagama, 118 U.S. 375 (1886); United States v. Candaleria, 271 U.S. 432 (1926); United States v. Creek Nation, 295 U.S. 103 (1935); Seminole Nation v. United States, 316 U.S. 286 (1942); Squire v. Capoeman, 351 U.S. 1 (1956).

of the highest responsibility and trust." *Seminole Nation v. United States, supra*, 316 U.S. at 296-297.[6]

The unique relationship between the United States and Indian people is repeatedly acknowledged by Congress as extending to all areas of Indian life. For example, in enacting the Indian Self-Determination and Education Assistance Act Amendments of 1988, slightly revising previous language, "Congress declare[d] its commitment to the maintenance of the Federal government's unique and continuing relationship with, and responsibility to, individual Indian tribes and the Indian people as a whole through the establishment of a meaningful Indian self-determination policy."[7] The direct trust responsibility the federal government has assumed for the welfare of Indian children, in particular, is clearly demonstrated by the Indian Child Welfare Act of 1978.[8] The congressional findings which accompany the Act make specific mention of the United States' position as Indian childrens' trustee:

> Recognizing the special relationship between the United States and the Indian tribes and the Federal responsibility to Indian people, Congress finds –

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[6] The Court's 1886 decision in *Kagama* goes to the very essence of the reason for describing the trust duty as humane and self-imposed: "These Indian tribes are the wards of the nation. They are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. . . . *From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.* This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen." United States v. Kagama, 118 U.S. 375, 383-385 (1886) (emphasis added).

[7] 25 U.S.C. § 450a(b); *see also* the Johnson O'Malley Act, *infra*, at 25.

[8] 25 U.S.C. §§ 1901-1952.

* * *

> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources.
>
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the *United States has a direct interest, as trustee, in protecting Indian children* who are members of or are eligible for membership in an Indian tribe.[9]

The interest of the federal government and Indian tribes in protecting Indian people and particularly Indian children is clearly independent of any connection to trust land, and extends beyond reservation boundaries. *See Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30 (1989); *Morton* v. *Ruiz*, *supra*.

In *Morton* v. *Mancari*, 417 U.S. 535 (1974), this Court relied upon "unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized tribes" and upheld Indian preference in Bureau of Indian Affairs hiring and job promotion.[10] Again, the special relationship between the federal government and Indian people extends to individual Indian interests, and is not limited to protection of their natural resources.

The present dispute, like that in *Ruiz*, involves a benefit program created by the United States solely for Indian people. And, just as in *Ruiz*, this dispute raises the issue of whether the government treats Indian people fairly in the administration of the program and in the distribution of the

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[9] 25 U.S.C. § 1901 (emphasis added).

[10] Morton v. Mancari, *supra*, 417 U.S. at 551.

benefits therefrom. From this perspective, the lessons of *Kagama*, *Seminole Nation*, *Seber*, *Mancari* and *Ruiz* teach us that the same distinctive obligation to deal fairly with Respondents, a class of severely emotionally and physically handicapped Indian children, attaches to the conduct of the government in this case. *Dealing fairly* with the Indian children here means, simply, to provide the affected families with *meaningful* access to the administrative process by way of *Federal Register* notice and comment prior to making a decision on the disposition of the Indian Childrens Program.

B. The Government's Characterization of the Trust Responsibility As Extending Only to Indian Property Ignores the Full History and Evolution of the Obligation, and Would Require the Court to Overturn its Decision in *Morton v. Ruiz*.

The present case involves a fact situation virtually identical to *Ruiz* wherein the aggrieved Indians challenged the denial of Snyder Act benefits (off-reservation Bureau of Indian Affairs general assistance payments). In *Ruiz* this Court specifically discussed the nature of the federal trust responsibility as it applies to Indian people rather than to Indian trust land. The Court first found that Congress' general directives in the Snyder Act (to spend appropriated money for "Indians throughout the United States . . . for relief of distress and conservation of health"[11]), together with the general, lump-sum appropriation language of the 1968 Department of Interior and Related Agencies Appropriation Act, were ample authority to require the Bureau of Indian Affairs to make off-reservation general assistance payments.[12] Clearly the

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[11] 42 Stat. 208, 25 U.S.C. § 13; *see* further discussion *infra*, at 22-24.

[12] The Court disregarded a contrary provision in the BIA's Indian Affairs Manual, limiting benefits to reservation residents, as well as Congress' failure to appropriate funds for

Court does *not* limit the trust responsibility to cases involving only trust lands, but rather extends the federal responsibility to the interests of individual Indians as well.

Despite the clear language of *Ruiz*, the government relies on *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987), for the proposition that the trust responsibility is implicated only where Indian property is at stake and that, as a result, the trust does not enter into this case because the funds at issue are "gratuitous appropriations, not trust funds belonging to the Indians." Government Brief at 13-14, 24-25, *citing Scholder* v. *United States*, 428 F.2d 1228, 1229 (9th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970), and *Quick Bear* v. *Leupp*, 210 U.S. 50, 80-81 (1908).

Scholder and *Quick Bear* are easily distinguished from the present case. The Ninth Circuit in *Scholder* mentioned the *Quick Bear* phrase, "gratuitous appropriations of public money," in dicta discussing a Fifth Amendment "taking" claim where the Court had already found the challenged use of the federal appropriations (to the benefit of a non-Indian irrigator within an Indian irrigation project) was permitted by the Snyder Act.

The *Quick Bear*[13] "gratuitous appropriations" versus "tribal"/"treaty" money distinction has no significance in contemporary Indian education law[A] where *all* federal Indian education programs are funded from public money,[14] or Indian health programs, which are all similarly funded from general revenues of the federal government, under the authority of the Snyder Act or the

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off-reservation general assistance payments. *Ruiz*, *supra*, at 210-213.

[13] *Quick Bear* addressed the question of whether or not federal education appropriations could be used for public schools where appropriation acts prohibited payment for sectarian education from "tribal" or "treaty" funds.

[14] E.g., Johnson O'Malley (JOM) Act, 25 U.S.C. §§ 452-454.

Indian Health Care Improvement Act.[15] The fact of general funding does *not* mean that Indian people have no right to challenge the termination, denial, or misuse of federal program benefits.[16]

The government's argument is flawed in its reliance on a decision of this Court which is inapposite to this case. The Court's decision in the 1987 *Cherokee Nation* case only involves asserted Indian property interests – in that case an interest in the mineral estate under a portion of the Arkansas River – so that the Court did not have before it a fact situation involving congressional appropriations, as it does here. *Cherokee Nation* does not support the argument that the trust responsibility applies only to Indian lands.

Indeed, quite the contrary is true. While many if not most of the Supreme Court decisions on the trust relationship may have involved Indian property, these decisions by no means limit the imposition or enforceability of the trust to property matters. In fact the dispute in *Morton v. Ruiz*, *supra*, involved Snyder Act appropriations – not property – which funded the Bureau of Indian Affairs' General Assistance program, and the issue of the scope of the agencies' distribution of those appropriated funds among the national Indian community. The Court in *Ruiz* never characterized those appropriations as "gratuitous;" indeed, it found that the Bureau was bound by a "distinctive obligation of trust" to "deal fairly with Indians" in the distribution of the funds.[17]

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[15] 25 U.S.C. 1601 *et seq.*

[16] *See*, e.g. Natonabah v. Board of Education of Gallup, McKinley County School District, 355 F.Supp. 716 (D.N.M. 1973) (challenging inappropriate use of JOM education funds by a school board), White v. Califano, 437 F.Supp. 543 (D.S.D. 1977), *aff'd* 581 F.2d 697 (10th Cir. 1978) (challenging denial of mental health services under the Snyder Act).

[17] *Ruiz*, *supra*, 415 U.S. at 236.

For this Court to agree with the government and limit the application of the United States' trust responsibility to matters involving property, it would be *required* to overturn the decision in *Ruiz* on this point, a result not even the government is seeking. *Amici* believe there is no principled way to distinguish *Ruiz* on the issue of whether the government bears a solemn trust responsibility to Indians in the administration of Indian health care programs funded by the Snyder Act, the Indian Health Care Improvement Act, and numerous congressional appropriation acts.

The government attempts to distinguish *Ruiz* on the basis that the Court there found a distinctive obligation to deal fairly with the Indians "only after the Court had concluded that Congress had made Indians living near reservations eligible for benefits," and as a result the duty of fairness was *triggered* by "the legitimate expectation of . . . [the] Indians." Government Brief at 41-42, quoting *Ruiz, supra,* 415 U.S. at 236. But this is a distinction without substance. If the test is, as the government asserts, whether the Indians' expectations of a trust duty in *Ruiz* are triggered by that one passage in the Snyder Act, that that test is met here, based on the entire body of federal legislative, judicial and administrative actions over the past two hundred years in matters involving Indian health.

The Court in *Ruiz* was also influenced substantially by the representations which the agency had made to Congress concerning the operation and administration of the general assistance program, as a means of justifying its budget request. These representations to Congress helped inform the Court on the agencies' interpretation and understanding of the trust duties it had accepted.[18] As in *Ruiz*, the Court here can apply the trust duty by deferring to representations made to Congress by the Indian Health Service and the Bureau of Indian Affairs

[18] *Ruiz, supra,* 415 U. S. at 214-228, 236.

concerning the success of the Indian Childrens Program and the importance of continued funding thereof.[19]

II. THE HISTORY OF DEALINGS BETWEEN THE UNITED STATES AND INDIAN PEOPLE EVINCES A SELF-IMPOSED OBLIGATION ON THE UNITED STATES TO PROVIDE HEALTH CARE TO INDIAN PEOPLE

To enable the Court to more fully understand why the government is bound in this case by this distinctive, *self-imposed* obligation, *amici* believe it is vital to trace the factual history of the United States' provision of health care to Indians and, importantly, the impact of the trends in general federal Indian policy which in many respects are directly responsible for the status of Indian health today.[20]

[19] Lower courts examining similar issues have found the trust obligation to extend to the government's delivery of health care to Indian people, in part on the basis of history, but also on the acknowledgement of the obligation as a matter of federal law and policy. McNabb v. Bowen, 829 F.2d 787 (9th Cir. 1987); White v. Califano, *supra*; Blue Legs v. Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989). For a discussion of the trust in other contexts *see* Vigil v. Andrus, 667 F.2d 931 (10th Cir. 1982); Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981); Kenai Oil & Gas, Inc. v. Department of the Interior, 671 F.2d 383 (10th Cir. 1982); Covelo Indian Community v. Federal Energy Regulatory Commission, 895 F.2d 581 (9th Cir. 1990).

[20] *See also,* United States Congress, American Indian Policy Review Commission, Task Force Six: *Indian Health, Final Report to the American Indian Policy Review Commission* (Washington, D.C. United States Government Printing Office 1976)(hereafter AIPRC Report); United States Congress, Office of Technology Assessment, *Indian Health Care,* OTA-H-290 (Washington, D.C. United States Government Printing Office 1986).

A. The Early Historical Period Between the United States and Indians is Marked by the Catastrophic Decline in the Indian Population Due to the Infestation of European Diseases and the Rapid Loss of Land Base and Access to Traditional Food Sources, and the Consequent Expansion of Federal Health Care Services to Indian People.

1. Colonial Period to 1832: The United States Began Providing Health Care to Indian People Soon After Diseases Carried by the Europeans first Devastated the Indian Population.

It is popular belief that few government services in the area of health were provided to Indians in the 19th Century, that few tribes received these services, and only then on the basis of sporadic agreements made in treaties with the United States.[21] Similarly, many inaccurately believe that Congress' involvement in Indian health care delivery did not commence until the enactment in 1921 of the Snyder Act.[22]

One popular misconception is that the Indian nations of the western hemisphere were "conquered" by dominant European governments.[23] Wars of military conquest indeed played a minor role in the settlement of the United States. However, the majority of Indian people were most commonly "conquered" by European diseases which, even if unintentionally spread,[24] were nonetheless

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[21] AIPRC Report, *supra*, note 20, at 27-32.

[22] 25 U.S.C. 13.

[23] See, e.g., Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587-591 (1823).

[24] There are at least two documented instances in which Indian tribes were deliberately infected with smallpox by Europeans. The best known case was perpetrated by General Jeffrey Amherst during Pontiac's Rebellion in 1763. See Duffy, John, *The Healers: The Rise of the Medical Establishment*, at 6. In the Seventeenth Century, the Chippewa Tribe was deliberately infected with smallpox by representatives of a fur trading company in retaliation for having killed a white man. Schoolcraft, Henry R., *Narrative of an Expedition through the Upper Mississippi to Itasca Lake in 1832*, (New York, Harper Brothers, 1834) at 254-255.

deadly.[25] Malaria, typhoid, typhus, smallpox, cholera, measles, scarlet fever, diphtheria, and a host of other diseases did not exist on this continent before the arrival of European explorers. The indigenous populations of North America were entirely vulnerable to, and defenseless against, the ravages which followed contact with Europeans.[26]

It is believed today that prior to contact the Native population was at least 10 million people; by 1887 that number had been reduced to 250,000. Most scholars attribute this decline, referred to in the literature as "depopulation," primarily to European disease.[27] In the ensuing social and political disintegration and disarray it was relatively easy for the European explorers and settlers to establish themselves as "conquerors."[28]

In the history of the legal relationship between the United States and Indian tribes there has been a tendency

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[25] See Dobyns, Henry F., *Native American Historical Demography: A Critical Bibliography* (1976).

[26] For an explanation of how biological immunities occur and how they affect the course of a disease among a given population, see Cartwright, Frederick F., in collaboration with Michael D. Biddiss, *Disease and History*, at 54-81.

[27] See Dobyns, *supra*, at n.8; Stern and Stern, *The Effect of Smallpox on the Destiny of the American Indian* (1945).

[28] Stern and Stern, *supra*, at n.8.

to focus on laws asserting control over trade and land transactions.[29] This emphasis has often obscured the history of the relationship between early colonial, continental and state governments and Indian people in such matters as health and education. Nonetheless, the early history forms an important backdrop against which the contemporary federal obligation must be measured.

2. The Federal Responsibility for Indian Health Care was Expanded Through the Legislative Process.

The Continental Congress appropriated money for education as early as 1775.[30] In 1819 the United States Congress passed the Civilization Act which established a permanent annual appropriation of $10,000 to be distributed by the President to charitable groups, usually missionary societies, to finance Indian education.[31] Significantly, a portion of these appropriations were set aside for health care for the Indian students.[32] Colonial governments such as those in Massachusetts organized tribes into "praying towns" subject to considerable colonial control. "Guardians," who were appointed to oversee these praying towns, were given authority in many areas

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[29] *See* Trade and Intercourse Act of 1793 (Nonintercourse Act) 1 Stat. 329 (1793); County of Oneida, New York v. Oneida Indian Nation of New York State, 470 U.S. 226 (1985); 25 U.S.C. 261, 262 (federal licensing of traders on Indian reservations).

[30] Cohen, Felix, *Handbook of Federal Indian Law* (New Mexico University Press 1st ed. 1942) at 47, 238-244.

[31] Act of March 3, 1819, 3 Stat. 516.; *repealed*, Act of February 14, 1873, 17 Stat. 437, 461.

[32] U.S. Serials, Vol. 423, House Document No. 203, House of Representatives, 27th Congress, 3rd Session, "Amount Disbursed for Civilization of the Indians 1819 to 1842," dated March 2, 1843 (e.g. pp. 21, 22, 23, 25, 27); Cohen, note 30, *supra*, at 243.

of personal life, including the power to support those who were sick or otherwise unable to work.[33]

Other medical services such as vaccinations were provided to Indian people for many years, beginning in 1802, through military doctors.[34] In 1832, Congress appropriated funds to be used to vaccinate Indian people against smallpox and authorized the use of both military and private doctors to administer the vaccinations.[35]

In 1831 when Chief Justice John Marshall characterized the federal-Indian relationship as "resembling that of a ward to his guardian,"[36] the statement was not a summation of what the relationship ought to be, but rather a legal analogy describing the situation *which actually existed*. By the early 1830's the federal government had become the exclusive health care provider for Indian people although the services were limited and by no means adequate to fill the vast needs of the tribes. But for the efforts of the United States government, however, Indian people would have had very limited access to

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[33] *Laws of the Colonial and State Governments Relating to Indians and Indian Affairs from 1633 to 1831, Inclusive, Containing the Proceedings of the Congress of the Confederation and the Laws of Congress from 1800 to 1830 on the Same Subject*, Washington, D.C. Thompson and Homans, 1832 at 15 (1758 law).

[34] The administration of Indian affairs was under the jurisdiction of the War Department until 1849. Act of March 3, 1849, 9 Stat. 395; Cohen, note 30, *supra*, at 10-11; *A Study of the Indian Health Service and Tribal Involvement in Health*, Hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate, 93rd Cong., 2d Sess., U.S. Government Printing Office, Washington, D.C. (Sept. 16, 1974) at 2.

[35] Act of May 5, 1832, 4 Stat. 514.

[36] Cherokee Nation v. Georgia, *supra*, 30 U.S. (5 Pet.) at 16-17.

western medicine and science.[37] Thus the obligation to provide health care to Indian people arose from the government's recognition of both its responsibility for the severe decline in Indian health and its duty to rectify it.

3. The Treaty Period, 1832 to 1871: Confinement of Indian People to Reservations During the Treaty Period of 1832 to 1871 Resulted in Stronger Federal Responsibility in Indian Health Programs Due to the Deterioration of Health Caused by the Inability to Gather Food, and the Restricted Access to Health Care.

The treaty period was defined by the United States government's desire to limit the territory used and occupied by Indian tribes, especially in the western United States. As settlers moved westward, competition between Indians and non-Indians for land, game and other natural resources increased, and conflict heightened. Through a combination of force and bargaining, the United States was able to negotiate 393 treaties during this period, resulting in a cession of 581,163,188 acres of land from the tribes to the United States.[38]

But the impact of the treaty and reservation process on the health of Indian people, and the corresponding shift in federal policy to address the serious needs created by this process, added greatly to the government's already distinct responsibility for Indian health care.

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[37] In later years the United States would actually outlaw the practice of traditional religions and medicine by Native Americans as a matter of law and policy. *See*, Fourth and Sixth Offenses, Regulations of the Indian Office, April 1, 1904 Secretary of the Interior (Washington: Government Printing Office, 1904) at pp. 102-03 [outlawing the "sun dance", "all other similar dances and so-called religious ceremonies" and the "usual practices of so-called medicine men"].

[38] Cohen, note 30, *supra* at 15, n. 115.

Through the process of establishing reservations Indian people were, in many instances, confined to reservations.[39] Those who attempted to leave reservations were often brutally forced back by the United States Army.[40] Prior to the reservation period, tribes had evolved economic systems which were closely related to the characteristics of the lands and natural resources within their aboriginal territories; e.g., in many instances there was great dependency on the proximity to available fish and game.

Confining a tribe on a much smaller parcel of land, even if the reservation lands were part of the much larger aboriginal holdings, often meant the disruption and destruction of the traditional means of subsistence. With traditional food supplies destroyed or inaccessible, many Indians were forced to depend on rations issued by the local Indian agent, which in many cases were insufficient or unsanitary.[41] Lack of traditional life practices contributed to declining individual fitness and health, and this deterioration was compounded by the deliberate suppression of tribal medicine practices.[42]

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[39] *See, e.g.*, Article II of the Treaty of October 14, 1865, with the Cheyennes and Arapahos, 14 Stat. 703, 704, which required the Indians to have the written consent of the Indian agent to leave their reservation. *See also*, the facts of the confinement of Geronimo's people, recounted in Fort Sill Apache Tribe of Oklahoma v. United States, 201 Ct. Cl. 630, 477 F.2d 1360 (1973), *cert. denied*, 416 U.S. 993 (1974).

[40] *See, e.g.*, Conners v. United States and the Cheyenne Indians, 33 Ct. Cl. 317 (1898), *aff'd.*, 180 U.S. 271 (1901).

[41] McGregor, Gordon, "Barriers to Economic Development," *American Indians, Facts and Future: Toward Economic Development for Native American Communities*, Report of the Joint Economic Committee, Congress of the United States (Arno Press, 1970) at 63.

[42] "American Indian Policy Review Commission's Report on Indian Health," *American Indian Journal*, Volume 3, Number 2 (February 1977) at 19.

Because confinement on a reservation left Indian people considerably more vulnerable to disease,[43] they became even more dependent upon the federal government for the provision of the necessities of life, including access to health care. Recognition of this dependency is mentioned in at least two dozen treaties which expressly obligate the United States to some form of health care for the Indian signatories thereto.[44] In all cases between the 1850's and 1910's the government filled the void in medical care for Indians through annual congressional appropriations for Indian vaccinations and other medical services, including the payment of physicians' salaries.[45]

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[43] *Tuberculosis Among the North American Indians: Report of a Committee of the National Tuberculosis Association Appointed on October 28, 1921*, Senate Committee Print, 67th Congress, 4th Sess., Printed for the Use of the Committee on Indian Affairs, Washington, D.C., Government Printing Office (1923) at 11.

[44] Cohen, note 30, *supra*, at 243 n. 86.

[45] Act of June 18, 1860, 12 Stat. 44, 57; Act of March 1, 1861, 12 Stat. 221, 237; Act of July 5, 1862, 12 Stat. 512, 528; Act of March 3, 1863, 12 Stat. 774, 790; Act of June 25, 1864, 13 Stat. 161, 179; Act of March 3, 1865, 13 Stat. 541, 558; Act of July 26, 1866, 14 Stat. 255, 278; Act of March 2, 1867, 14 Stat. 492, 514; Act of July 27, 1868, 15 Stat. 198; Act of April 10, 1869, 16 Stat. 13, 14; Act of July 15, 1870, 16 Stat. 335; Act of March 3, 1871, 16 Stat. 544, 545; Act of May 29, 1872, 17 Stat. 165, 166; Act of February 14, 1873, 17 Stat. 437, 440; Act of June 22, 1874, 18 Stat. 146, 148; Act of March 3, 1875, 18 Stat. 420, 423; Act of March 3, 1877, 19 Stat. 271, 272; Act of May 27, 1878, 20 Stat. 63, 66; Act of February 17, 1879, 20 Stat. 295, 297; Act of May 11, 1880, 21 Stat. 114, 116; Act of March 3, 1881, 21 Stat. 485, 501; Act of March 6, 1882, 22 Stat. 7, 9; Act of May 17, 1882, 22 Stat. 68, 86; Act of March 1, 1883, 22 Stat. 433, 449; Act of July 4, 1884, 23 Stat. 76, 94; Act of March 3, 1885, 23 Stat. 362, 380; Act of May 15, 1886, 24 Stat. 29, 43; Act of March 2, 1887, 24 Stat. 449, 464; Act of June 29, 1888, 25 Stat. 217, 233; Act of March 2, 1889, 25 Stat. 980, 997; Act of August 19, 1890, 26 Stat. 336, 355; Act of March 3, 1891, 26 Stat. 989, 1008; Act of July 13, 1892, 27 Stat. 120, 138; Act of March 3, 1893, 27 Stat. 612, 632; Act of August 14, 1894, 28 Stat. 286, 306; Act of March 2, 1895, 28 Stat. 876, 879; Act of June 10, 1896, 29 Stat. 324; Act of June 7, 1897, 30 Stat. 62, 65; Act of July 1, 1898, 30 Stat. 321, 571, 574; Act of March 1, 1899, 30 Stat. 924, 927; Act of May 31, 1900, 31 Stat. 221, 224, 241; Act of March 3, 1901, 31 Stat. 1058, 1061, 1071; Act of May 27, 1902, 32 Stat. 245, 248; Act of March 3, 1903, 32 Stat. 982, 985; Act of April 21, 1904, 33 Stat. 189, 192; Act of March 3, 1905, 33 Stat. 1048, 1050; Act of June 21, 1906, 34 Stat. 325, 330, 339; Act of March 1, 1907, 34 Stat. 1015, 1018, 1025; Act of April 30, 1908, 35 Stat. 70, 74; Act of March 3, 1909, 35 Stat. 781, 784; Act of April 4, 1910, 36 Stat. 269, 271.

Federal Indian agents also had discretionary authority to employ physicians for Indians living on reservations;[46] by 1874 about half of the sixty-nine Indian agencies had a doctor in residence.[47]

4. The Allotment Period, 1871 to 1921:[48] The Bureau of Indian Affairs Expanded the Number of Medical Personnel Serving Individual Indians, Who, Due to the Increased Breakdown of Tribal Connections Caused by Allotment Policies, Were Continuing to Experience Unmet Medical Needs.

Between 1874 and 1900, the number of doctors in residence on reservations had nearly tripled,[49] and by

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[46] United States v. Patrick, 73 F. 800, 20 C.C.A. 11 (C.C.A. 8, 1896), *error dismissed*, 18 S.Ct. 949, 42 L.Ed. 1216 (1898).

[47] Cohen, note 30, *supra*, at 243. According to the Appropriations Act of June 22, 1874, 18 Stat. 146-147, there were sixty-nine Indian agencies in that year.

[48] Allotment refers to the General Allotment (Dawes) Act of 1887, Act of February 8, 1887, 24 Stat. 388, and the well known period wherein vast holdings of tribal, communal lands on Indian reservations were broken up and "allotted" to individual members of the tribe, to be held in trust by the government until such time as the individual was deemed capable of managing his or her own affairs. See, e.g., Cohen, note 30, *supra*, at Chapter 11.

[49] Act of March 1, 1899, 30 Stat. 924-926.

1912 the Bureau had 160 doctors in the field, two-thirds of whom were full-time Bureau employees.[50]

During the late nineteenth century, hospitals funded by the federal government became a part of the health care delivery system for Indian people. The first Indian service hospital was built in 1882, in conjunction with the Carlisle Indian Boarding School, the first off-reservation boarding school. By 1900, there were five Bureau of Indian Affairs' hospitals with a total capacity of 150 beds.[51] Congress appropriated funds for the construction of an insane asylum for Indian people at Canton, South Dakota in 1899,[52] and a tuberculosis sanitorium in 1906-1907.[53]

Despite these efforts, Indian health statistics still lagged significantly behind those of the American public at large. In 1912, for example, the death rate for Indian people was 35 per thousand, more than twice the national rate of 15 per thousand. Approximately 15% percent of the national Indian population was estimated to have trachoma and tuberculosis.[54] Citing these grim statistics,

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[50] Message of President Taft, 48 *Cong. Rec.* 10643 (August 10, 1912, Senate Doc. No. 907).

[51] Tyler, S. Lyman, *A History of Indian Policy*, United States Government Printing Office 1973, at 90; Raup, Ruth M., *The Indian Health Program from 1800 to 1955* at 3, 9 (unpublished paper available from the National Indian Law Library, Boulder, Colorado).

[52] Act of March 1, 1899, 30 Stat. 924.

[53] Act of June 21, 1906, 34 Stat. 325, 328; Act of March 1, 1907, 34 Stat. 1015, 1052.

[54] Message of President Taft, *supra*, at n.50.

President Taft, in his statement in support of congressional appropriations for Indian health, remarked that "[a]s guardians of the welfare of the Indians, it is our immediate duty to give the race a fair chance for an unmaimed birth, a healthy childhood, and a physically efficient maturity."[55]

Federal policies regarding Indian health during the allotment era followed the general shift toward assimilation and focused on the health care needs of *individual* Indian people. The shift in philosophy was characterized in federal policy by the elevation of the individual Indian above the tribal community, fostering individual initiative, education and Christianization. The real *objects* of the guardianship relationship became Indian people rather than the tribes. By weakening the identification between individual Indians and their tribal communities, allotment policies further strengthened the dependence of individual Indians on the federal government. Indeed, the Supreme Court justified the policies and process of allotment on the ground that the federal government was obligated to step in and protect individual Indians because living in tribal communities had not resulted in individual prosperity in the western sense of the term.[56]

The impact of the allotment era on the federal bureaucracy was immediate and significant. The Bureau of Indian Affairs was given the responsibility within the federal bureaucracy of transforming Indian people into self-supporting, productive American farmers and citizens. At a minimum, this meant educating and improving the health of Indian people so that they could fulfill the expectations of federal policy. The Bureau, which had once only been concerned with the activities of a few hundred tribes and reservations, was suddenly forced to

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[55] *Id.*

[56] Cherokee Nation v. Hitchcock, 187 U.S. 294, 301-302 (1902), *quoting in part* Stephens v. Cherokee Nation, 174 U.S. 445, 450 (1899).

establish and institutionalize programs to serve several hundred thousand individual Indians. The result was an unprecedented era of growth; from 1887 to 1920 the Bureau's budget tripled, the bureaucracy flourished, and along with it, medical services continued to expand.

B. The Modern Era Evinces a Continuing, and Expanding Self-Imposed Trust Obligation on the United States to Provide Health Care to Indian People.

The modern era is characterized primarily by two factors: significantly increased congressional appropriations and, for the first time, comprehensive federal legislation to deal comprehensively with Indian health care issues. This legislation has continued to acknowledge the United States' obligation to meet the health care needs of Indian people.

1. The Snyder Act and the Indian Reorganization Act.

a. The Snyder Act of 1921[57] provided for the first time a permanent legislative authorization for congressional appropriations in the area of Indian health care.

> [T]he Bureau of Indian Affairs [shall] . . . direct, supervise, and expends such monies as Congress may from time to time appropriate, for benefit, care, and assistance of the Indians throughout the United States. . . . For the relief of distress and conservation of health . . . and [f]or the employment of . . . physicians. . . . [58]

There were procedural reasons for enacting a statute which authorized the expenditure of federal funds to

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[57] Act of November 2, 1921, 42 Stat. 208, 25 U.S.C. 13.

[58] *Id.*

meet the government's duty to provide for Indian health care services.[59] Shortly before the passage of the act, jurisdiction over appropriations for Indian affairs in the House of Representatives had been transferred from the Indian Affairs Committee to the Appropriations Committee.[60] This move sparked a jurisdictional dispute between the committees, during which the members of the Indian Affairs Committee expressed their displeasure with the new state of affairs by a spate of point of order objections.[61] The Act was passed in part then as a reaction to this procedural deadlock.

But of equal importance in the history of the enactment of the Snyder Act, and what is missing from the government's present characterization of the Act's purpose, is Congress' recognition of the preexisting *and* continuing duty to provide Indians with health care.[62] Government's Brief at 16-18. Most importantly the debate on the Act demonstrates that Congress authorized Snyder Act services to *continue* its obligations under the federal trust responsibility.

Members of the House of Representatives debating the Snyder Act were well aware of the guardianship responsibility of the United States with respect to Indian affairs,[63] of the poor health status of Indian people,[64] and

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[59] H.R. Rep. No. 275, 67th Cong., 1st Sess. (1921); S. Rep. No. 294, 67th Cong., 1st Sess. (1921).

[60] 61 *Cong. Rec.* at 4671-4672 (August 4, 1921).

[61] *Id.* at 4671-4673.

[62] Programs providing Indian health services had been viewed for years as " . . . integral parts of the Indian service, nearly all of which had been appropriated from year to year, and which will continue, in all probability, as long as the service does." H.R. Rep. No. 275, 67th Cong., 1st Sess. (1921), and 61 *Cong. Rec.* at 4684.

[63] *Id.* at 4660, 4681, 4686.

[64] *Id.* at 4663.

of the importance of health care to the future productivity and well-being of Indian people.[65] Indeed, during the debate Representative Leatherwood of Utah went so far as to characterize health care as one of the "fundamental" obligations of the United States to Indian people.[66]

b. The Indian Reorganization Act, which was passed as an attempt to strengthen Indian tribal institutions, also contained an increase of federally provided health services.

In 1934 Congress passed the Indian Reorganization Act (IRA),[67] expressly as a repudiation of the failed policies of allotment and assimilation.[68] The IRA was part of the genesis of new federal policies aimed at Indian country, commonly known as the "Indian New Deal."[69] Continuing a trend established in previous historical periods, the United States' commitment to Indian health care was further strengthen by the IRA. By 1940 the federal government was spending over $5 million annually to provide medical services to Indian people.[70] These increased appropriations were coupled with an interagency agreement which allowed the BIA to use Public Health Service doctors on Indian reservations. By 1940 the BIA employed 200 doctors and 600 graduate nurses working

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[65] *Id.* at 4664.

[66] *Id.* at 4677.

[67] Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. 461 *et seq.*

[68] The 1928 *Meriam Report* ("The Problem of Indian Administration"), published by the Brookings Institution, denounced the results of fifty years of allotment policy and of federal efforts to force Indian people into the American mainstream to compete for jobs.

[69] Cohen, note 1, *supra*, at 147-151.

[70] Cohen, note 30, *supra*, at 243 n. 94.

in hospitals that had a system-wide direct care capacity of over 4,000 beds.[71]

2. The Johnson O'Malley Act (JOM), Passed in 1934,[72] Acknowledged the United States' Responsibility to Provide Comprehensive[73] Medical Services for Indian People.

The Johnson O'Malley Act authorized the Secretary of the Interior to enter into contracts with state and local governments to provide for the "education, medical attention, agricultural assistance and social welfare" Indian people in instances where, as a result of allotment, tribal life was broken up and many Indian people were no longer on reservations.[74] The federal government via JOM would remain financially responsible for services to individual Indians.[75]

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[71] Raup, note 51, *supra*, at 9-12.

[72] Act of April 16, 1934, 48 Stat. 596, amended by the Act of June 4, 1936, 49 Stat. 1458, 25 U.S.C. 452 *et seq.*

[73] There is little doubt that the intent was to obligate the federal government to provide comprehensive medical services to Indians: "medical attention" in the act is defined to include " . . . physical examinations, medical and surgical work and treatments, hospitalization, dispensary and convalescent care, nursing, sanitation and the application of such other public health measures as might be necessary, including the prevention, investigation, suppression and control of contagious and communicable diseases." S. Rep. No. 511, 73 Cong., 2d Sess. at 3-4 (1934); H.R. Rep. No. 864, 73 Cong., 2d Sess. at 3 (1934).

[74] S. Rep. No. 511, 73rd Cong., 2d Sess. at 1-2 (1934).

[75] *Id.* at 3; H.R. Rep. No. 864, 73 Cong., 2d Sess., at 2 (1934).

3. The Transfer Act Further Strengthened Government Commitment to Provide Health Care for Indians Even During the Termination Era When the Government Questioned its Relationship with Indian Tribes.

Passed in 1954 at the height of the Termination Era in Indian policy,[76] the Transfer Act[77] transferred "all functions, responsibilities, authorities and duties of the Department of the Interior, the Bureau of Indian Affairs, the Secretary of the Interior and Commissioner of Indian Affairs relating to the maintenance and operation of hospital and health facilities for Indians . . . " to the newly created Indian Health Service of the Department of Health Education and Welfare (now Department of Health and Human Services).[78]

By its terms the Transfer Act implicitly acknowledged the obligation of the United States to provide health care to Indian people.[79]

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[76] The Termination Era describes the period of time between 1943 and 1961 in which the United States Congress unilaterally revoked the "recognized" political status of dozens of Indian tribes. For an in depth discussion of termination, see Cohen, note 1, *supra*, at 152-180.

[77] Act of August 5, 1954, 68 Stat. 674, amended by Section 69(a) of the Health Maintenance Organization Act of 1973, 87 Stat. 935, 42 U.S.C. 2001 *et seq*.

[78] 68 Stat. 674.

[79] Also enacted in the termination era were the Indian Health Facilities Act of 1957, Pub. L. 85-151, 42 U.S.C. 2005 (authorized the Indian Health Service to contribute to the construction costs of community hospitals), and the Indian Sanitation Facilities and Services Act of 1959, Pub. L. 86-121, 42 U.S.C. 2004 (authorized IHS to provide sanitation facilities to Indian people, including domestic and community water supplies and facilities, drainage facilities, and waste disposal facilities for Indian homes, communities, and lands).

The act is noteworthy since the acknowledgement of continuing federal responsibility came at a time when the prevailing mood was to eliminate tribalism in the United States. The message was clear, the obligation to provide health care for individual Indians would not be shirked. The Senate report on the proposed transfer acknowledged that "the Bureau of Indian Affairs is responsible, under present law, for the *total health program* – both preventive and curative medicine – for all Indians registered as members of the various tribes in the United States and Indians and natives in Alaska."[80] Indeed, the legislative history of the Act shows that the transfer was motivated in large part by the desire to *improve* the quality of medical services provided to Indian people by placing the administration of their health program under the professionally administered and better funded Public Health Service.[81]

4. The Indian Health Care Improvement Act, Passed When the United States Had Returned to a Policy of Strengthening Indian Tribes, Continued the Government's Commitment to Health Care for Indian People.

The first significant piece of Indian health care legislation in the modern Self-Determination Era[82] is the

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[80] S. Rep. No. 1530, 83rd Cong., 2d Sess., (1954), as reprinted in the U.S. Code Cong. and Admin. News, 83rd Cong., 2d Sess. (1954) Volume 2 at 2918-2919 (emphasis added).

[81] *Id.* at 2926-2927, 100 *Cong. Rec.* 8959, 8960, 8963-8966. It was the prevailing sentiment in the Congress that "the Indian shall have a health service and hospital service comparable to that which the white man receives." Remarks of Senator Thye of Minnesota, 100 *Cong. Rec.* 8962 (June 25, 1954).

[82] Generally considered to be from 1961 to the present date. *See* Cohen, note 1, *supra*, at 180-206.

Indian Health Care Improvement Act of 1976 (IHCIA).[83] The congressional findings in the introduction of the legislation reflect the almost two hundred year history of the federal government's primary role as provider of Indian health care services. These findings concisely state the continuing problems and the continuing commitment of the United States government to address them:

> (a) Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with and resulting responsibility to the American Indian people.
>
> (b) A major national goal of the United States is to provide the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level and to encourage the maximum participation of Indians in the planning and management of those services.
>
> • • •
>
> (e) All other Federal services and programs in fulfillment of the Federal responsibility to Indians are jeopardized by the low health status of American Indian people.[84]

To fulfill the United States' obligation the IHCIA established a variety of programs designed to improve the scope and quality of federal health services, including the elimination of backlogs of known unmet needs, the upgrading of inadequate facilities, and of urban and rural

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[83] Act of September 30, 1976, 90 Stat. 1400, 25 U.S.C. 1601 *et seq.*

[84] 25 U.S.C. 1601(a), (b), and (e).

Indian health services.[85] Subsequent amendments continue to improve and expand substantially the quality and scope of Indian health programs.[86]

C. Summary.

In summary, the history of the dealings between the United States and Indian people in matters involving Indian health discussed in the preceding section shows clearly the depth of the federal government's commitment to a trust responsibility. In passing the Snyder Act, Congress created authorizing legislation for health programs which had been evolving over the years as part of the federal-Indian trust relationship. Any perceived ambiguities in the Snyder Act were clarified by subsequent legislation. The legislative history of the Johnson O'Malley Act shows that Congress intended to provide comprehensive medical services to all members of federally recognized tribes, even though many Indians were no longer isolated geographically from the general population.

That Congress continually reaffirmed the importance of providing medical care to all tribal members can be seen in the Transfer Act, passed in order to improve the quality of medical services to Indians even in the height of the termination era. In 1976 Congress passed the Indian Health Care Improvement Act to make an unequivocal statement that the government's Indian health care delivery system was "consonant with and

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[85] *See, e.g.*, Titles II, III, and V of the IHCIA, 25 U.S.C. 1621, 1631, and 1651.

[86] *See, e.g.*, Pub. L. 100-713, Nov. 23, 1988, 102 Stat. 4784; Pub. L. 102-573, October 29, 1992, 106 Stat. 4526.

required by the unique legal relationship between the federal government and Indian people.[87]

From this almost two century history Indian people have a well deserved expectation to be treated fairly by federal agencies in the delivery of health care services. It derives from the trust responsibility, which the United States has a legal and moral obligation to uphold. The federal courts deciding this case below understood this obligation in ruling for the Respondent Indian children.

CONCLUSION

For the foregoing reasons the decision of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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[87] 25 U.S.C. 1601(a).

No. 91-1833

In The

Supreme Court of the United States

October Term, 1992

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, ET AL.,

Petitioners,

v.

GROVER VIGIL, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE AMICI CURIAE IN SUPPORT OF RESPONDENTS

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Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, the Native American Protection & Advocacy Project, Post Office Box 306, Window Rock, Arizona, 86515, and the Navajo Nation, Department of Justice, Post Office Drawer 2010, Window Rock, Arizona, 86515, file the attached brief *amici curiae* in support of Respondents to the above-captioned case. Both parties have consented in writing to the filing of this brief; said letters of consent accompany this brief as required by Rule 37.3.

INTEREST OF AMICI CURIAE

The Native American Protection & Advocacy Project (NAPAP), a project within DNA-People's Legal Services, Inc., provides free legal assistance to individuals with physical and mental disabilities residing on the Navajo Nation and the Hopi Reservation; or are members of the San Juan Southern Paiute Tribe; the service area of NAPAP extends into the States of Arizona, New Mexico, and Utah. NAPAP advocates on behalf of individuals with disabilities in Tribal, State and Federal forums. Several of NAPAP's current clients are Native American children with disabilities who are having problems with the provision of services.

The Navajo Nation is the largest Indian tribe in the United States, having nearly one-quarter of a million members. The Nation covers 25,000 square miles and extends into the states of Arizona, New Mexico and Utah. A large segment of the Nation's members are children, and a significant portion of those children have

disabilities and are eligible for ICP services. The Navajo Nation represents the interests of its children in this Brief.

Amici Curiae are concerned about the potential impact an adverse decision in this case will have on Native American children with disabilities in general, and Navajo children with disabilities in particular, in light of the lack of services available to Native American children with disabilities nationwide and here within the Navajo Nation. Allowing the Bureau of Indian Affairs and the Indian Health Service to terminate the Indian Children's Program (ICP) without notice and an opportunity to comment would seriously affect the ability of Native American children to obtain the health services necessary for assistance in becoming healthy participants in society.

SUMMARY OF ARGUMENT

Native Americans suffer from disabling conditions at a rate much higher than the general population, and thus are in need of appropriate services at a level much higher than the general population. Native Americans residing on a reservation tend to face additional barriers to the provision of these services which prevents many Native Americans from receiving appropriate services. The ICP has been able to remove some of these barriers to the receipt of such services by Native American children in this area, and has proven to be an invaluable service for these children. Termination of the ICP without the kind of full consideration that would result from notice and comment will result in irreparable harm to many Native American children with disabilities.

ARGUMENT

I. NATIVE AMERICANS AND NAVAJOS SUFFER FROM DISABILITIES AT A RATE SIGNIFICANTLY HIGHER THAN THE GENERAL UNITED STATES POPULATION AND THEREFORE HAVE AN INCREASED NEED FOR APPROPRIATE SERVICES

A. The General Native American Population

In 1990 there were approximately 1.9 million Native Americans, Eskimos and Aleuts in the United States. 1990 Census, RESIDENT POPULATION BY STATE AND BY RACE: 1990. There are 278 Indian reservations, and approximately 24 percent of the Native Americans reside in those reservations. Administration for Native Americans (ANA), NATIVE AMERICAN DATA BASES (September 10-13, 1992), pp. 2-3. The on-reservation Native American population is much younger than the general population. Nearly half of the on-reservation families with children had incomes near or below the poverty level in 1979. ANA, at pp. 2-3. Nearly half of the Native American population is concentrated in the states of Arizona, California, New Mexico, Oklahoma and Washington. 1990 Census. And although Native Americans comprise only one percent of the total United States population, they comprise 50 percent of the diversity in the United States. ANA, at p. 1.

The National Congress of American Indians (NCAI) has found that Native American infants are being born with disabling conditions at three times the rate of all other babies born in the United States; Native American men have a seven times greater chance of becoming disabled before their 26th birthday than any other group of

men in the United States; research has indicated that nearly eighty-five percent of all the disabilities prevalent among Native Americans can be prevented or rehabilitated; state prevention and rehabilitation services seldom reach urban Indians and almost never cross reservation boundaries; and, with the exception of some Tribal Vocational Rehabilitation Programs, there are no services on Indian reservations specifically tailored to address the needs of disabled Native Americans. National Congress of American Indians, RESOLUTION TO CREATE A COMMITTEE ON DISABILITIES (November 1990).

The Native American Research and Training Center (NARTC) has reached the following conclusions: Native Americans have the second greatest number of persons with disabling conditions of all ethnic groups in the United States; Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE) are found in Indian infants nationally at the rate of 30% and the rate is increasing annually at 6%; for every child born with FAS, it is estimated that there are three others who have FAE; visual impairments occur three times more frequently among Native Americans, and hearing losses four times more frequently, than among the general population; and bacterial meningitis, otitis media, accidents and trauma, and congenital anomalies occur among Indian populations at an overall rate of twice the national average. Factors that contribute to bacterial meningitis include chronic otitis media and the absence of running water and sanitation facilities in many on-reservation Native American communities.

Additionally, Native Americans had the highest birth rate in 1986, almost double the overall United States birth rate. A.N.A., at p. 7. Native American children ages three through 21 exhibit a much higher prevalence of learning disabilities and multi-handicapping conditions (11.86 percent) than the corresponding population at large (1.81 percent). J. Toubbeh, Ph.D., HANDICAPPING AND DISABLING CONDITIONS IN NATIVE AMERICAN POPULATIONS, p. 4. A 1989 investigation by the United States General Accounting Office (GAO) revealed that for Native American preschool children, who had Individual Education Programs completed or some diagnostic evaluation reports in their school records, the primary diagnosed handicapping conditions were: speech impaired; developmentally delayed; multihandicapped; other health impaired; specific learning disability; and mentally retarded. United States General Accounting Office, SPECIAL EDUCATION: ESTIMATES OF HANDICAPPED INDIAN PRESCHOOLERS AND SUFFICIENCY OF SERVICES (March 1990), pp. 46-47. Some of the main *causes* of disabling conditions in Native American children include congenital abnormalities, accidents, infections (such as meningitis), and developmental delays caused by poor or inadequate nutrition. J. Joe and C. Locust, GOVERNMENT POLICIES AND THE DISABLED IN AMERICAN INDIAN COMMUNITIES (Update August 1989), p.1.

These alarming statistics indicate that many Native Americans suffer from one or more disabling conditions, thus creating a special need for services appropriate for individuals with disabilities. Those Native Americans who are located near metropolitan areas are sometimes

able to take advantage of the multitude of services available in those areas, but Native Americans who remain on their reservation have only very limited federal programs to turn to for help. Because the on-reservation population is very young, the need for appropriate services for Native American children with disabilities is particularly compelling.

B. The Navajo Reservation Population

The Navajo Nation with its geographic and population size has a median age of 21.8 years, and the 1990 Census shows that Navajos 17 years of age and younger residing on the reservation constitute 43.5 percent of the total 1990 population. Sixty percent of Navajo children under five years of age are living below the poverty level; for Navajo children ages six to eleven the rate is 57 percent. The overall rate of Navajos living below poverty level is 54 percent. The unemployment rate on the Navajo Nation is 27.9 percent.

Although the number of developmentally disabled Navajos has been estimated to be between 9,000 and 13,500 persons, only 3,000 have been identified and are receiving services – less than 21 percent. F. Hodge and S. Weinmann, DISABLED AMERICAN INDIANS; AN OVERVIEW OF THE ETIOLOGY OF DISABILITY IN THE ALASKA, MONTANA AND NAVAJO AREAS, 1987, p. 16. It has also been estimated that three percent of Navajo newborns have a developmental disability. *Id.* A survey conducted in 1987 found that there were 7,355 Navajos with disabilities between the ages of five and twenty-one, representing 11.33 percent of the overall Navajo school

population. N.E.E.D.S. Research Project, NAVAJO EVALUATION OF EXISTING DISABILITY SERVICES RESEARCH PROJECT (1987), p. 71.

The ten most frequent disabling conditions found in Navajo children by the IHS include: developmental delay; seizure disorder; language/speech delay; meningitis; prematurity; cerebral palsy; mental retardation; FAS/FAE; spastic quadriplegia; and failure to thrive. F. Hodge, at p. 9a.

Thus the primary disabling conditions among Navajo children mirror those found among the Native American population in general. The causes of these disabling conditions can be related to four major sources found on the Navajo Nation, including low birth weight, bacterial meningitis, FAS/FAE, and otitis media. F. Hodge, at pp. 10-12, 17.

Many Navajo women become mothers during their teen years which puts their children at risk for low birth weight. Low birth weight has been considered a related factor in many disabling conditions, including developmental delay, language and speech delay, cerebral palsy and mental retardation. F. Hodge at p. 10.

Additionally, the incidence of bacterial meningitis is a significant problem on the Navajo Reservation, and in 1987 was the major cause of death among Navajo infants and young children. Bacterial meningitis has been related to problems of developmental delay, seizure disorder, orthopedic disorders, language delay and mental retardation. Bacterial meningitis comparisons show a rate of 27.7 per 100,000 Navajos from 1968 to 1973 to a rate of 5.9 per

100,000 in Bernalillo County, New Mexico from 1964 to 1971. F. Hodge, at p. 10-11.

FAS has been considered a likely major cause of serious health problems among the Navajo. FAS and FAE have been associated with developmental delay, seizures, orthopedic problems, cerebral palsy and mental retardation. F. Hodge, at p. 11.

Otitis media, which is an infection of the middle ear, has been found to be extremely prevalent, infecting approximately 4.2 percent of Navajo children. This infection, even when it does not cause partial or complete deafness, profoundly affects the psychological and social development of these children. F. Hodge, at p. 17.

Children are our most important asset, and children with disabilities especially require our utmost attention. The statistics indicate a desperate need for appropriate services for handicapped children on the Navajo Nation.

II. THERE ARE SIGNIFICANT BARRIERS TO ACCESS OF DISABILITY RELATED SERVICES FOR NATIVE AMERICANS AND NAVAJOS RESIDING WITHIN THE RESERVATIONS

The availability of disability-related services on reservations throughout the United States is a critical problem. The relative remoteness, isolation and economic characteristics of Indian reservations present extreme difficulties in recruitment and retention of qualified health care professionals. In June 1984, 547 special education positions went vacant in New Mexico. N.E.E.D.S. Research Project, at p. 31. A 1990 survey of the BIA's

Branch of Exceptional Education revealed that many disabled Native American preschoolers received inadequate services, primarily due to the lack of qualified service providers on or near Indian reservations, compounded by the lack of funding to hire them even if they were available. GAO Briefing Report to Congressional Requesters, SPECIAL EDUCATION: ESTIMATES OF HANDICAPPED INDIAN PRESCHOOLERS AND SUFFICIENCY OF SERVICES (1990), p. 29.

Indeed, even when on-reservation services are available, inter-agency disagreements create a bureaucratic nightmare. The United States Department of Education and the United States Department of Interior (Interior) dispute who has responsibility for Education of the Handicapped Act (EHA) services. In 1990, when it reviewed the GAO's draft report, Interior reported:

> "1) in receiving EHA funds, it agreed to assure services to those children enrolled in *its* programs;
>
> 2) if no other agencies will provide services to handicapped Indian children enrolled in non-BIA programs, BIA *may* do so; and
>
> 3) the education delivery system on Indian reservations is too complex to specify, exclusively and without exception, which agency is responsible for providing special education services to handicapped Indian preschoolers on reservations with BIA schools."

GAO Briefing Report, at p. 33. (emphasis added). The United States Department of Education contends that

once the Interior receives EHA funds it has the responsibility to provide EHA mandated services to *all* reservation Indian children on those reservations with BIA schools, regardless of the program they are enrolled in and regardless of the bureaucratic complexity found on the reservation. *Id.*

The GAO and the BIA identified three factors as barriers to the provision of appropriate services on reservations: 1) lack of qualified personnel; 2) lack of funding; and 3) the uncertainty of appropriate agency responsibility. Each of these three factors exist on the Navajo Nation; additional factors also appear.

The Indian Health Service (IHS) is the primary provider of health services on the Navajo Nation. However, given the size and terrain of the Nation these services are not easily accessible to Navajos. In many parts of the Nation a visit to IHS requires travel over a long distance on rough and sometimes impassable roads. Once there, a Navajo needing assistance faces a long wait at the facility, IHS eligibility requirements, and all too frequently, the absence of any specialty services. If the Navajo requires a health service unavailable at the local facility, he or she must travel to Albuquerque or Phoenix for treatment at these more extensive facilities, provided that IHS is willing to make a referral.

A survey of Navajo families disclosed their opinion that the second most important area needed in helping Navajos with disabilities was special education (appropriate housing was named the most important). N.E.E.D.S. Research Project, at p. 57. The survey also

revealed the need to coordinate services among all providers. *Id* at p. 72, 75.

Other barriers to obtaining services include cultural lifestyles, economic conditions and the highly rural nature of life on the Navajo Nation. Many of the Nation's residents speak only Navajo, many elders speak very little English, and many follow traditional beliefs. Some Navajos see western medical practices as in conflict with Navajo tradition. The high unemployment rate and number of individuals living below poverty level dictate substantial dependence on the public health services.

III. THE ICP PROVIDES AN INVALUABLE RESOURCE FOR NAVAJOS AND MANY NATIVE AMERICAN CHILDREN WILL BE INJURED IF THE ICP IS ALLOWED TO BE TERMINATED

The Indian Children's Program (ICP) helps overcome many of the barriers discussed in this Brief. The Program is designed to provide diagnostic and assessment services to Native American children in this area in order to determine the cause and nature of health and education problems, and to provide assistance to families to maximize the utilization of health resources available in the community. The Program has made a commitment to match children with appropriate services, enhancing the number of quality services available. Where necessary, it provides additional services, training, and consultation to better meet the needs of children and their families.

The ICP is located through the offices of Northern Arizona University, University of Utah and University of New Mexico, and has an on-site office. The ICP has hired Native Americans who can assist in providing culturally specific services. ICP personnel travel to the clients' residences to provide services. The locations of the ICP enable it to hire qualified personnel through the universities. The ICP also acts as a watchdog to ensure that responsible agencies provide legally mandated services, catching those children who fall between the cracks and are ineligible for other services. The ICP provides essential training and educational programs to organizations involved with Indian children.

Currently the ICP has 345 clients, almost half of whom are Navajo. The majority of ICP clients have been identified as learning disabled, emotionally disturbed, mentally retarded, cerebral palsied, communications disordered or multihandicapped. By definition, these 345 clients are Native American children ineligible for services elsewhere, and if the ICP were terminated they would be left without alternate services.

The ICP is an essential program for Native American children with disabilities in this area; it removes many of the barriers existent in the provision of appropriate services. Termination of the ICP will result in many disabled Native American children not receiving appropriate and needed services. Providing services to children with disabilities at the earliest age possible is essential to the rehabilitation and prevention of disabling conditions.

CONCLUSION

For the foregoing reasons the decision of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully sumitted,

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No. 91-1833

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICI CURIAE ON BEHALF OF SIX AMERICAN INDIAN TRIBES AND TRIBAL ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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BRIEF AMICI CURIAE ON BEHALF OF SIX AMERICAN INDIAN TRIBES AND TRIBAL ORGANIZATIONS IN SUPPORT OF RESPONDENTS

The amici described below submit this brief because of the unusual importance of this case to Indian tribes and tribal organizations which rely upon the Indian Health Service (IHS) for health services to their members, or which operate their own health care programs in conjunction with the IHS under the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, 25 U.S.C. §§ 450-450n (Indian Self-Determination Act). We urge this Court to uphold the decision below.

INTERESTS OF AMICI CURIAE

Amicus BRISTOL BAY AREA HEALTH CORPORATION (BBAHC) is a private, non-profit corporation organized in June 1973, by the Alaska Native villages of the Bristol Bay region in Alaska. BBAHC provides a wide variety of health services including hospital, family medicine, dental, mental health, alcoholism treatment, health education and other preventive health services. BBAHC serves more than 7,000 year-round residents and 32 Alaska Native villages within the Bristol Bay and a portion of the Calista regions, two of the twelve regions into which Alaska was divided in 1971 under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629e. The Bristol Bay region encompasses a portion of southwest Alaska that is approximately the size of the State of Ohio. In 1980, BBAHC became the first tribal organization in the United States to take over the operation of a hospital from the IHS under the authority of the Indian Self-Determination Act.

Amicus MENOMINEE INDIAN TRIBE (Menominee Tribe) is a federally recognized Indian tribe residing on the Menominee Indian Reservation in Wisconsin. The Menominee Tribe's sovereign authority has been recognized by several treaties, principally the Treaty of May 12, 1854, 10 Stat. 1064, 2 Kappler 626, which established the Menominee Reservation. Federal recognition of the Menominee Tribe was terminated in 1954, 68 Stat. 250, but was restored in 1973, 87 Stat. 770, 25 U.S.C. §§ 903-903f. The Menominee Tribe operates a comprehensive outpatient health care program, including a clinic and dental clinic and programs for community health, reproductive health, mental health, alcohol and substance abuse, and emergency medical services. The Menominee Tribe has operated these programs since 1977 under an Indian Self-Determination Act contract with the IHS. The Menominee Tribe's current service population is more than 3,900.

Amicus METLAKATLA INDIAN COMMUNITY (Metlakatla Community) is a federally recognized Indian tribe residing on the Annette Islands Reservation in southeast Alaska. This reservation is the only remaining federal Indian reservation in Alaska. 25 U.S.C. § 495. Approximately 1,300 tribal members reside on the reservation. Pursuant to section 16 of the Indian Reorganization Act 25 U.S.C. § 476, the Metlakatla Community has adopted a constitution and bylaws which were approved by the Secretary of the Interior on August 23, 1944. The Metlakatla Community provides a range of health services to its members including a health clinic, a dental clinic, a mental health program, a community health program, a pre-natal care clinic and a diabetes clinic, all through a contract with the IHS under the Indian Self-Determination Act.

Amicus MISSISSIPPI BAND OF CHOCTAW INDIANS (Choctaw Band) is a federally recognized Indian tribe residing on the Mississippi Choctaw Reservation in Mississippi. The Choctaw Band is comprised of descendants of Choctaw Indians who resisted relocation to Indian Territory (now Oklahoma) following the Treaty of Dancing Rabbit Creek, Sept. 30, 1830, 7 Stat. 333, 2 Kappler 310. The Choctaw Band's lands were proclaimed a federal Indian reservation in December 1944, 9 Fed. Reg. 14,907, pursuant to an Act of Congress. 53 Stat. 851. Pursuant to the Indian Reorganization Act, the Choctaw Band has adopted a constitution and bylaws which were approved by the Secretary of the Interior in May 1945. Through a contract with the IHS under the Indian Self-Determination Act, the Choctaw Band operates a comprehensive health services program which includes a hospital and three field clinics. The services provided include inpatient and outpatient medical care, dental care, mental health and alcoholism, emergency medical services, community health, and environmental health. The Choctaw Band has contracted with the IHS since 1971, beginning with the Community Health Representatives

program, and since 1981 the Choctaw Band has operated the entire IHS health care program for the reservation under contract. The Choctaw Band's service population is more than 6,000 people.

Amicus NARRAGANSETT INDIAN TRIBE (Narragansett Tribe) is a federally recognized Indian tribe occupying a federal Indian reservation near Charlestown, Rhode Island. The Narragansett Tribe presently provides health services to eligible members through an IHS contract, including a community health program, alcohol and substance abuse program, public health nutrition services, with the balance of medical, dental and pharmaceutical health services provided by private health providers in the surrounding communities. The Narragansett Tribe has about 2,000 members. The Narragansett Tribe's plans for 1993 are to establish an outpatient clinic to provide health service directly to the Narragansett Tribe's Indian population.

Amicus NORTON SOUND HEALTH CORPORATION (NSHC) is a non-profit corporation organized and controlled by the sixteen Alaska Native villages in the Bering Straits region of Alaska, which provides health care services to more than 6,150 Alaska Native residents of the region, one of the aforesaid twelve Alaska Native regions. The region served by NSHC encompasses a sizeable portion of northwest Alaska, over 25,000 square miles, an area larger than the State of West Virginia.

SUMMARY OF ARGUMENT

The Tenth Circuit Court of Appeals ruled in the decision below that the Indian Health Service's (IHS) termination of the Indian Children's Project (ICP) was not committed to agency discretion and was therefore judicially reviewable under the Administrative Procedure Act (APA), 5 U.S.C. § 701(a)(2). In doing so, the Court concluded that Congressional intent to fund the ICP, together with the federal trust responsibility to the Indian tribes and the directives of the Snyder Act, 25 U.S.C.

§ 13, provided "law to apply" for purposes of judicial review.

Seeking reversal, the Government argues, *inter alia*, that the Court of Appeal's use of legislative history is in direct conflict with Justice Scalia's opinion in *International Union, UAW v. Donovan*, 746 F.2d 855 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 825 (1985). Your amici disagree. The Government's reliance on *Donovan* is misplaced since this case differs significantly from *Donovan* in two respects. First, the unique fiduciary responsibilities of the United States in this instance hold the IHS's conduct to a higher standard than that required of the agency involved in *Donovan*. Thus, while under normal circumstances, an agency's representations to Congress and to the beneficiaries it serves might not provide meaningful standards of review, the IHS's representations to Congress and the Indian tribes do so in this case. Second, unlike the IHS here, the *Donovan* agency never represented to Congress that it supported the program in controversy nor did its actions ever disregard the intentions of Congress. Furthermore, even the additional limitations suggested by Justice Scalia in *Webster v. Doe*, 486 U.S. 592 (1988) (Scalia, J., dissenting), do not preclude review.

Finally, the Government's contention that legislative history may never supply "law to apply" is erroneous. Therefore, the IHS's decision to terminate the ICP *without any prior notice* is not committed to agency discretion by law.

ARGUMENT

INTRODUCTION

The Government mistakenly contends that the Court of Appeals' decision "strips discretion from federal agencies in allocating agency resources" and "requires an agency to undertake notice-and-comment rulemaking whenever a contemplated action could have an adverse impact on Indians." (Petitioner's Brief at 12.) But that is not the case. The decision below neither limits the agency's discretion to allocate resources nor does it require rulemaking procedures in every instance. Rather, the Court of Appeals' decision only requires notice and comment procedures when the IHS terminates a program to the detriment of Indian tribes that has been funded by Congress *at the request of the Indian tribes and of the IHS.* More importantly, the Court's decision reaffirms the longstanding fiduciary responsibility of this country to the American Indian tribes.

The United States has assumed a legal and moral responsibility to provide health care services to Indian tribes as a result of numerous treaties, executive orders, and statutes, in exchange for lands ceded to the United States. *See* Indian Health Care Improvement Act (IHCIA), 25 U.S.C. § 1601(a) (finding that "[f]ederal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people"). That responsibility has been further defined by statutes, regulations, and court decisions.

One aspect of this responsibility is the principle of tribal consultation which the United States has imposed upon itself in order to reverse the paternalism that has historically permeated the federal-tribal relationship. *See* IHCIA, 25 U.S.C. § 1601(b) ("a major national goal of the United States is . . . to *encourage the maxi-*

mum participation of Indians in the planning and management of those services") (emphasis added). "Great nations, like great men, should keep their word." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). The decision below holds the United States to its word.

I. THE "LAW TO APPLY" TEST UNDER THE APA

The Government contends that the IHS's decision to terminate the ICP was committed to agency discretion within the meaning of 5 U.S.C. § 701(a)(2). The APA provides that an agency action is reviewable unless it is either precluded by statute or committed to agency discretion by law. 5 U.S.C. § 701(a)(1) and (a)(2). The second exception, for matters committed to agency discretion, "is a very narrow exception." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). It applies only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). There is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667, 670 (1986). In *Franklin v. Massachusetts*, —— U.S. ——, 112 S. Ct. 2767 (1992), four justices of this Court recently expressed the view that:

> "More generally, the Court has limited the exception to judicial review provided by 5 U.S.C. § 701(a)(2) to cases involving national security, such as *Webster v. Doe* [486 U.S. 592 (1988)] and *Department of Navy v. Egan* [484 U.S. 518 (1988)], or those seeking review of refusal to pursue enforcement actions, see *Heckler v. Chaney*, 470 U.S. 821 (1985); *Southern R. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Morris v. Gressette*, 432 U.S. 491 (1977)." 112 S. Ct. at 2785 (parallel citations omitted).

In *Heckler v. Chaney*, 470 U.S. 821 (1985), this Court explained that the "no law to apply" test means "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." 470 U.S. at 830. *See also Webster v. Doe*, 486 U.S. 592, 600 (1988). The District of Columbia Court of Appeals, in describing the narrowness of this exception, has specifically rebutted claims that only statutory language can supply "law to apply":

> "Even when there are no clear statutory guidelines, courts are often still able to discern from the statutory scheme a congressional intention to pursue a general goal. If the agency action is not found to be reasonably consistent with this goal, then the courts must invalidate it. The mere fact that a statute grants broad discretion to an agency does not render the agency's decisions completely nonreviewable under the 'committed to agency discretion by law' exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) (footnote omitted).

Thus, judicial review is available whenever there are *any* "meaningful standards" against which to judge the agency's exercise of discretion. Even "background understandings" that inform the substantive statutes may often supply law to apply. *Id.* at 45, n.13.

In the present case, the IHS's exercise of discretion was its failure to notify those served by the ICP—the 426 handicapped Indian children and the Indian tribes to which they belong—that it was terminating the program. Accordingly, the issue before this Court is whether there are any meaningful standards against which to judge the IHS's failure to notify the Indians that it was terminating the ICP. Notice and comment procedures are especially important to insure that an agency's decision

is deliberate and made with the full consideration of its impact upon program beneficiaries. If the respondents in this case had received notice, then at least they could have petitioned both the IHS and Congress for assistance.

The Tenth Circuit properly concluded that the Snyder Act, 25 U.S.C. § 13, the IHCIA, 25 U.S.C. §§ 1601-83, Congressional intent to fund the ICP as revealed in the legislative history of five appropriations statutes [1], and the special trust relationship between the federal government and the Indian tribes, all supplied a meaningful standard

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[1] *Department of the Interior and Related Agencies Appropriations for 1985: Hearings Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations*, 98th Cong., 2d Sess., pt. 3, 486 (1984) (narrative submission describing continuation of the ICP);

Department of the Interior and Related Agencies Appropriations for 1984: Hearings Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations, 98th Cong., 1st Sess., pt. 3, 351 (1983) (narrative submission describing continuation of the ICP);

Department of the Interior and Related Agencies Appropriations for 1983: Hearings Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations, 97th Cong., 2d Sess., pt. 3, 167 (1982); H.R. Rep. No. 942, 97th Cong., 2d Sess., 54, 109 (1982).

Department of the Interior and Related Agencies Appropriations for 1982: Hearings Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations, 97th Cong., 1st Sess., pt. 9, 70-74 (1981);

Department of the Interior and Related Agencies Appropriations for 1981: Hearings Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations, 96th Cong., 2d Sess., pt. 3, 632 (1980);

Department of the Interior and Related Agencies Appropriations for 1980: Hearings Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations, 96th Cong., 1st Sess., pt. 8, 245-52 (1979) (IHS request for ICP funding); H.R. Rep. No. 374, 96th Cong., 1st Sess., 81-83 (1979) (designation of funding for expansion of ICP); S. Rep. No. 363, 96th Cong., 1st Sess. 90-91 (1979) (designation of funding for ICP).

of review and therefore constituted "law of apply" for purposes of judicial review.

The Government disagrees. In its brief, the Government maintains that: (1) congressional hearings and committee reports cannot provide a standard of review, relying primarily upon Justice Scalia's opinion in *International Union, U.A.W. v. Donovan*, 746 F.2d 855 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 825 (1985) (Petitioner's Brief at 18-23); and (2) neither the special trust relationship nor the Snyder Act, 25 U.S.C. § 13, supply law to apply (Petitioner's Brief at 16-17; 23-27). Both conclusions are wrong. The amici's brief, however, will focus on reviewability of the IHS's action to terminate the ICP under the APA, 5 U.S.C. § 701(a)(2).

The government's reliance upon *Donovan* is misplaced. Not only do the facts in *Donovan* differ significantly from those in this case, but so does the standard of responsibility to which the United States is held. Furthermore, this Court, as well as the lower courts, have permitted the use of legislative history in reviewing agency actions. Therefore, this Court should affirm the judgment below.

II. THE PRESENT CASE IS DISTINGUISHABLE FROM *DONOVAN*

Donovan held that legislative history cannot supply a standard of review for purposes of the APA. The present case, however, differs from *Donovan* in two significant respects: (1) this case involves federal-Indian relations in which context the United States is held to the stricter standards of a fiduciary; and (2) both the Executive Branch and Congress intended at the time of passage to continue the existence of the program.

A. The Unique Situation of Cases Involving Indian Tribes

Unlike *Donovan*, the present case involves the unique situation in which the federal government is held to a higher standard of a fiduciary rather than to the normal standards of conduct which might otherwise govern the actions of the Executive Branch concerning beneficiaries of congressional programs. "The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions." *Morton v. Ruiz*, 415 U.S. 199 (1974). That the trust responsibility is just as applicable to the IHS as it is to the Bureau of Indian Affairs is supported not only in law but also by the IHS's own regulations.

Generally, *all* federal agencies which undertake programs for the benefit of American Indians are bound by the trust obligation. Their actions must be governed by fiduciary standards. This Court stated in *Seminole Nation v. United States*, 316 U.S. 286 (1942), that the United States "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians should therefore be judged by the most exacting fiduciary standards." 316 U.S. at 297. The Ninth Circuit recognized this principle in *Pyramid Lake Paiute Tribe of Indians v. United States Dep't. of the Navy*, 898 F.2d 1410 (9th Cir. 1990) when it said:

> "This court . . . has read the [fiduciary] obligation to extend to any federal government action. *Nance v. EPA*, 645 F.2d 701, 710, 711 (9th Cir.), *cert. denied*, 454 U.S. 1081 (1981). While most cases holding the government to this duty have involved Indian property rights, the government's trustee obligations apparently are not limited to property. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); Cohen's Handbook of Federal Indian Law at 225-28 (1982 ed.)." 898 F.2d at 1420 (parallel citation omitted).

See also Felix S. Cohen, *Handbook of Federal Indian Law* 226 (1982) ("Court decisions have also held that the ordinary fiduciary standards of a private fiduciary must be adhered to by executive officials administering Indian property or federal programs").

The IHS is also cognizant of its fiduciary duties. The regulations of the Secretary of Health and Human Services state:

> "*Trust Responsibility* means the responsibility assumed by the Government, by virtue of treaties, statutes and other means, legally associated with the role of trustee, *to recognize, protect and preserve tribal sovereignty* and to protect, manage, develop, and approve authorized transfers of interests in trust resources held by Indian tribes and Indian individuals to be a standard of the highest degree of fiduciary responsibility." 42 C.F.R. § 36.203(*l*) (1991) (emphasis added).

Thus, the Secretary's own regulations recognize the agency's obligation to support the exercise of authority by tribal governments, which includes the sovereign power to safeguard the health and welfare of tribal members. *See also* Cohen at 246.

The administration of programs, including the ICP, authorized under the Snyder Act are governed by strict fiduciary standards. In *Fox v. Morton*, 505 F.2d 254 (9th Cir. 1974), the Ninth Circuit Court of Appeals held that Indian plaintiffs were entitled to a due process hearing prior to termination from a program funded under the Snyder Act, explaining that:

> "At the outset, we recognize that assistance programs established under the Snyder Act are for the special benefit of Indians and Indian communities and must be liberally construed in their favor. *Ruiz stands for the principle that our government has an overriding duty of fairness when dealing with Indians*, one founded upon a relationship of trust for the

> benefit of these '. . . dependent and sometimes exploited people.' *The Snyder Act was enacted with this principle in mind, and its programs must be administered accordingly.*" 505 F.2d at 255 (emphasis added) (citations omitted).

Similarly, the administration of programs authorized under the IHCIA are also governed by strict fiduciary standards. In *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977), the court stated:

> "The Congress in 1976 stated that the federal government had a responsibility to provide health care for Indians. Therefore, when we say that the trust responsibility requires a certain course of action, we do not refer to a relationship that exists only in the abstract, but rather to a congressionally recognized duty to provide services for a particular category of human needs. The trust responsibility, as recognized and defined by statute, is the ground upon which the defendants' duties rest in this case.
>
> ". . .
>
> "We have, therefore, read and construed the Indian Health Care Improvement Act as a manifestation of what Congress thinks the trust responsibility requires of federal officials, with whatever funds are available, when they try to meet Indian health needs." 437 F.2d at 557.

The Eighth Circuit Court of Appeals affirmed per curiam. *White v. Califano*, 581 F.2d 697 (8th Cir. 1978).

The significance of the special relationship between the federal government and the Indian tribes is that ordinary standards of responsibility for agency conduct do not apply when Indian programs are at issue. Thus, while *Donovan* suggests that an agency might ordinarily escape judicial review if it were to misrepresent to Congress in budget requests its intention to continue a program, and to subsequently ignore committee recommendations, the unique trust relationship prevents the

IHS from making such representations to Congress and then ignoring them whenever its priorities change.

In this case, the IHS made repeated representations by submitting to Congress budget requests that asked for continued funding of the ICP. Naturally, these requests impliedly represented to tribes and to the Congress that the IHS intended to continue rather than terminate the ICP. The IHS's FY 1985 budget request states:

> "The *Indian Children's Program* (ICP) continues to function as a regional interagency IHS-BIA/Office of Indian Education Programs (OIEP) project which services emotionally, educationally, physically and mentally handicapped American Indian children and youth in the southwest. For individual children, the ICP is providing diagnostic, evaluation, treatment planning and follow-up services. For parents, community groups, school personnel and health care personnel, the ICP is providing training in child development, prevention of handicapping conditions, and care of the handicapped child. Training activities occur on both a regional and national basis. These activities respond to continued congressional interest in a national collaboration on behalf of handicapped children.
>
> "*. . . Every attempt will be made to retain the level of professional and paraprofessional staffing strengthened by the FY 1984 funding.*" Department of Health and Human Services, Indian Health Service, *Fiscal Year 1985—Volume VI—Justification of Appropriation Estimates for Comm. on Appropriations* 39-40 (1984) (emphasis added).

Shortly before its decision to terminate the ICP, the IHS again asked Congress for funds to continue the ICP. The IHS's FY 1986 budget request, submitted in early 1985, states:

> "To support the Indian Children's Program effort as an interagency IHS-BIA/Office of Indian Education Programs (OIEP) project which services emotionally, educationally, physically, and mentally handicapped American Indian children and youth. Program activities include consultation, training, and technical assistance in response to national requests with the preponderance of direct service responses being regionally focused." Department of Health and Human Services, Indian Health Service, *Fiscal Year 1986—Volume X—Justification of Appropriation Estimates for Committee on Appropriations* 56 (1985).

Since the IHS was asking for money which would not even be available until after October 1, 1985, it is fair to say that both Congress and the Indian tribes were entitled to expect the IHS to continue the ICP.[2] When the IHS later changed its priorities so that the appropriation was not to be spent as previously represented, the affected tribes had a right to expect that they would be consulted or *at least* notified. The IHS's 1986 budget request announced that "[t]he IHS has and continues to involve tribes in resource planning and allocation methodology to reflect tribal concerns." *Id.* at 38.[3]

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[2] The Comptroller General has said:

> "[W]here an amount to be expended for a specific purpose which is not otherwise prohibited is included in a budget estimate, the appropriation is legally available for the expenditure even though the appropriation act does not make specific reference to it." United States General Accounting Office, Office of the General Counsel, *Principles of Federal Appropriations Law*, 4-9 (1991) (citations omitted).

[3] The IHS has acknowledged the longstanding importance of tribal consultation in connection with its resource allocation procedures elsewhere:

> "Tribal Consultation Principle
>
> "Tribes and Indian people have important roles in determining IHS resources allocation strategies and policies. Tribes contribute to setting priorities during budget formulation. More importantly, tribal input to the Congress influences appropriations and often results in the specific directives for the use and

This Court has recognized in the unique sphere of Indian law that if a federal agency makes repeated representations to Congress when seeking funds for Indian programs, then the agency should be held to its word:

> "[I]t is essential that the legitimate expectation of these needy Indians not be extinguished by what amounts to an *ad hoc* determination of the agency that was not promulgated in accordance with its own procedures, to say nothing of the Administrative Procedure Act. The denial of benefits to these respondents under such circumstances is inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Morton v. Ruiz*, 415 U.S. at 236 (citations omitted).

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allocation of appropriated resources (earmarks)." Department of Health and Human Services, Indian Health Service, *Resource Allocation Abstracts; Basic Descriptive Information about IHS Appropriations, Allocation Formulae, and 1991 Allocations to Areas* 3 (1991).

The IHS's 1990 report to Congress on its resource allocation methodology, the Health Services Priority System, was distributed to all Indian tribes. It contained the following statements:

> "The statutory requirement for active participation in the planning, conduct, and administration of IHS programs by the recipient constituency is perhaps unique among Federal programs. This requirement has led to special efforts by the IHS to consult with and involve Indian tribes in the development of significant policies affecting health programs for Indian people.
>
> " . . .
>
> "[T]he Indian tribes expect, and the IHS has committed to the tribes, that they shall have an active voice in the further evolution of resource allocation policies for the IHS. It is this commitment that requires the IHS to consult with Indian tribes on the proposals contemplated for the current allocation methodology." Department of Health and Human Services, Indian Health Service, *Health Services Priority System—A Report to Congress* 28-30 (May 4, 1990).

Even announcements of policy provides a basis of judicial review. "Once an agency has declared that a given course is the most effective way of implementing the statutory scheme, the courts are entitled to closely examine agency action that departs from this stated policy." *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) (footnote omitted).

Appropriation of funds under the Snyder Act are governed by the strict standards imposed by the trust responsibility. In *Adams v. Hodel*, 617 F. Supp. 359 (D.D.C. 1985), the Indian plaintiffs challenged a BIA rule amending the "need" levels for several assistance funds. The *Adams* plaintiffs particularly objected to the BIA's reliance on language contained in a congressional appropriations report. They argued that it violated the requirements for reasoned decision-making because implied repealers of substantive statutes by subsequent appropriations acts are strongly disfavored. The court rejected that argument:

> "The Supreme Court has recognized that such directions from the Appropriations Committee govern the operation of the General Assistance program under the Snyder Act—which is, as has been noted previously, a very broadly worded appropriations authorization statute. See *Morton v. Ruiz*, 415 U.S. at 205-12. . . . [T]he BIA's reliance on explicit directions contained in the Appropriations Committee report, its usual source of directions, can hardly be said to have been improper." 617 F. Supp. at 362 (parallel citation omitted).

The court then explained:

> "This rather unique system of congressional oversight and direction of the General Assistance program renders this case readily distinguishable from . . . cases . . . cited by plaintiffs for the proposition that appropriations bills do not have the force of law and that committee reports are entitled to little weight as indicia of legislative intent. . . . This case . . . involves the use of annual appropriations legislation to give substantive content to an appropriations authorization statute which only derives its content from annual appropriations measures." *Id.* at 362, n.12.

The preceding paragraphs demonstrate why the respondents and the plaintiffs are uniquely situated. Unlike the situation presented in *Donovan*, the trust responsibility present here places the federal government in the role of a trustee. Its actions are to be judged by the "most exacting fiduciary standards." *Seminole Nation*, 316 U.S. at 297. These same fiduciary obligations have been recognized by the courts in cases involving the Snyder Act and the IHCIA. *See* pp. 12-13, above. Furthermore, the IHS itself has recognized this obligation in its own regulations. *See* p. 12, above. The IHS has also announced a policy of tribal consultation, even in matters involving resource allocation. *See* pp. 15-16, above. Finally, the IHS's FY 1985 and 1986 budget requests for congressional funding of the ICP created a legitimate expectation in the Congress and the Indian tribes that the IHS would continue the ICP.

Therefore, the substantive laws in this case, the Snyder Act and the IHCIA, both provide meaningful standards of judicial review since they place the IHS in the role of a fiduciary. Similarly, the IHS's own regulations place the IHS in the role of a fiduciary. Furthermore, the IHS's own policy statements require the IHS to consult with tribes on matters involving resource allocation. Thus, when the IHS terminated the ICP, it not only acted contrary to its own previous representations to the tribes and Congress, it also failed to follow its own policy of consultation. Most importantly, by abandoning the handicapped children served by the ICP, the IHS violated its own duties under the Snyder Act and the IHCIA as a fiduciary. Accordingly, this Court should affirm the decision below.

B. The Present Case is Factually Different From *Donovan*

The facts in *Donovan* are substantially different from the facts in the present case. Accordingly, the Tenth Circuit's decision does not conflict with the views expressed by the District of Columbia Court of Appeals in *Donovan*.

In *Donovan*, the Court was asked to determine whether the Secretary of Labor's decision not to allocate any of a lump-sum appropriation of $3.7 billion to the Department of Labor's Employment and Training Administration for purposes of carrying into effect the Trade Act training program, was judicially reviewable.

In 1981 Congress amended the Trade Act of 1974 to authorize the Secretary to approve training for workers under certain circumstances, but did not require him to do so. 19 U.S.C. § 2296(a)(1) (1976); *Donovan*, 746 F.2d at 862 ("the Secretary is *not* required by the substantive statute to approve training for those who meet the conditions of § 2296(a)(1)") (emphasis in original). In 1982, Congress funded the Department of Labor's operations through four continuing resolutions. The first contained a general funding provision of $3.7 billion for the Department's Employment and Training Administration which administers the Trade Act training program. The second continuing resolution merely extended the first resolution's expiration date and contained no new directives. The third continuing resolution, however, expressly provided $25 million for the Trade Act training program. The fourth continuing resolution merely extended the third resolution's expiration date. The district court held that the Secretary acted unreasonably in allocating only $25 million to the Trade Act training program. The Court of Appeals reversed.

The *Donovan* court found that in the absence of specific directives, nothing in the $3.7 billion appropriation bill required the Secretary to spend any of that money on the training program. 746 F.2d at 863 ("It carefully specifies that $2,001,000 of this shall be for the National Commission for Employment Policy but provides no direction as to how the remainder is to be distributed.") In fact, "[t]he legislative history shows at least a congressional realization, if not a congressional intent, that nothing would be expended for Trade Act training out of the

$3.7 billion lump-sum appropriation." *Id.* at 859. In fact, efforts made prior to passage to amend the $3.7 billion appropriation to specifically earmark money for the training program were defeated. *Id.* at 860. Thus, in *Donovan*, there was not even any legislative history, much less statutory language, which supported the plaintiff's contention that the Secretary was required to spend more than $25 million on the Trade Act training program. By contrast, the legislative history in this case clearly demonstrates the IHS's intention to continue the ICP. Furthermore, the legislative history also demonstrates that Congress was aware of the ICP and intended for the IHS to continue the program. Therefore, the government's reliance upon *Donovan* is misplaced.

In *Blue Ocean Preservation Society v. Watkins*, 767 F. Supp. 1518 (D. Haw. 1991), the court was presented with a claim by the Department of Energy that "the Conference Committee language directing the use of appropriated funds to prepare an EIS 'is not binding on the agency.'" 767 F. Supp. at 1522. The court responded:

> "In making this claim, the Government relies on *Intern. Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) . . . . The court is not persuaded that the Congressional appropriation at issue here is such a 'lump-sum appropriation.' The appropriation was very specifically earmarked." *Id.* at 1522, n.2.

The instant case presents a similar situation. Unlike *Donovan*, the agency never stated that it did not support the program. In fact, in our case, Congress appropriated money to an agency that had specifically asked for money to continue a program. Since Congressional intent for IHS to continue the ICP provides "law to apply," the IHS's decision to terminate the ICP is reviewable.

III. NONE OF THE FACTORS PRECLUDING JUDICIAL REVIEW IN JUSTICE SCALIA'S *WEBSTER* DISSENT ARE PRESENT

Even under the additional limitations suggested by Justice Scalia in *Webster v. Doe*, 486 U.S. 592 (1988) (Scalia, J., dissenting), the IHS's action is subject to judicial review. In the *Webster* dissent, Justice Scalia wrote that the "common law" of judicial review of agency action suggests that certain issues and areas are beyond the range of judicial review, even in the presence of "law to apply." 486 U.S. at 608. These areas include:

> "[P]rinciples ranging from the 'political question' doctrine, to sovereign immunity . . ., to official immunity, to prudential limitations upon the court's equitable powers, to what can be described no more precisely than a tradition of respect for the functions of the other branches reflected in the statement of *Marbury v. Madison*, 1 Cranch 137, 170-171 (1803), that '[w]here the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.'" *Id.* at 608-609.

Thus, Justice Scalia argued, the Supreme Court has taken into account not only the "text and structure of the statute under which the agency acts" but such factors as:

> "[W]hether the decision involves a 'sensitive and inherently discretionary judgment call,' whether it is the sort of decision that has traditionally been nonreviewable, and whether the review would have 'disruptive practical consequences' . . . ." *Id.* at 609 (citation omitted).

The IHS's decision to terminate the ICP without first providing any notice to the beneficiaries is not precluded by any of these other factors.

First, the IHS's decision does not involve a sensitive and inherently discretionary judgment call. With re-

spect to Indians, the courts have routinely reviewed federal agency decisions involving the allocation of funds and the termination of benefits. *See e.g., Morton v. Ruiz*, 415 U.S. 199 (1974) (review of BIA's allocation of limited funds under the Snyder Act); *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569 (9th Cir. 1980) (review of the IHS's distribution of funds for violations of the IHS's statutory, trust, or constitutional duties to the California Indians); *Vigil v. Andrus*, 667 F.2d 931 (10th Cir. 1982) (review of the withdrawal of free school lunch program from Indian children, noting that the trust relationship "suggests that the withdrawal of benefits from Indians merits special consideration").

Second, the IHS's decision is not the sort of decision for which review traditionally has been precluded. As previously noted, this narrow class more properly applies to cases involving national security and to those seeking review of refusal to pursue enforcement actions. *See Franklin v. Massachusetts*, 112 S. Ct. at 2785 (Stevens, J., concurring). *See also Heckler v. Chaney*, 470 U.S. at 832. Furthermore, "[t]he overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions." *Morton v. Ruiz*, 415 U.S. at 236 (1974).

Finally, review of the IHS's decision will not have disruptive practical consequences. Neither the district court nor the court of appeals held that the IHS could not have terminated the ICP, or other programs similarly situated. Rather, the decisions below simply required that the IHS follow proper notice and comment procedures as required under the APA. Furthermore, the judicial review of this case served an important purpose—to safeguard the interests of a small and historically disadvantaged minority, who have often turned to the courts as the only means by which to assert and protect their rights. Therefore, the courts may properly review the IHS's decision to terminate the ICP without first providing notice to the respondents.

IV. THE USE OF LEGISLATIVE HISTORY IS PERMISSIBLE

Contrary to the government's assertions, this Court has turned to legislative history when searching for law to apply. In *Webster v. Doe*, 486 U.S. 592 (1988), the Court examined "the overall structure" of the National Security Act in order to determine if the NSA was drawn so that a court would have no meaningful standard against which to judge an agency's actions. 486 U.S. at 600. That law, included both Senate and House reports. *Id.* at 601-02 (citing S. Rep. No. 239, 80th Cong., 1st Sess., '2 (1947); H.R. Rep. No. 961, 80th Cong., 1st Sess., 3-4 (1947)). The Court concluded that "the language and structure of § 102(c) indicate that Congress meant to commit individual employee discharges to the Director's discretion" and therefore were unreviewable under 5 U.S.C. § 701(a)(2). *Id.* at 601. *See also Robbins v. Reagan*, 780 F.2d 37 (D.C. Cir. 1985).

The Courts of Appeals often resort to legislative history in appropriate circumstances. In *McNabb v. Bowen*, 829 F.2d 787, (9th Cir. 1987), the Ninth Circuit specifically applied the trust responsibility to the IHS's actions in determining whether the IHS was a primary or residual provider. 829 F.2d at 793 ("Once again, this question must be answered in terms of congressional intent and the federal government's overriding trust responsibility"). The Ninth Circuit stated that "[w]e may refer to reports of the congressional appropriations committee for guidance in determining the proper rules for providing Indian health assistance." 829 F.2d at 793, n.6. In *Singh v. Moyer*, 867 F.2d 1035 (7th Cir. 1989), the court held that "[i]n determining whether a 'meaningful standard' for review is available, this court considers four areas: the statutory language, the statutory structure, the legislative history, and the nature of he agency action." 867 F.2d at 1038.

Furthermore, the government errs in asserting that legislative history can never "supply law." In *Chevron*

U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), this Court answered this contention:

> "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843, n.9.

Thus, when Congress relies upon agency representations and appropriates money with the intention to fund a program, that intent is the law, and provides a standard of review. Furthermore, the use of Congressional intent is especially appropriate in situations where the actions of a federal agency in the role of a fiduciary shape that intent. Therefore, this Court has the authority to review the IHS's termination of the ICP.

SUMMARY

The Government's reliance on *Donovan* to support the proposition that the agency's action is nonreviewable under the APA is misplaced since this case differs significantly from *Donovan* in two respects. First, the unique fiduciary responsibilities of the United States in this instance hold the IHS's conduct to a higher standard than that required of the *Donovan* agency. Thus, while under normal circumstances, an agency's representations to Congress and to the beneficiaries it serves might not provide meaningful standards of review, the IHS's representations to Congress and to the Indian tribes do so here. Furthermore, the *Donovan* agency never represented to Congress that it supported the program in controversy nor did its actions ever disregard the intentions of Congress. Furthermore, even the additional limitations suggested by Justice Scalia in his *Webster* dissent do not preclude review. Finally, the Government's contention that legislative history may never supply "law to apply" is erroneous. Therefore, the IHS's decision to ter-

minate the ICP without any prior notice is not committed by law to agency discretion.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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